

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1955 ¹⁷

No. ~~676~~ ⁹⁴ 5

CHARLES ROWOLDT, PETITIONER,

vs.

J. D. PERFETTO, ACTING OFFICER IN CHARGE,
IMMIGRATION AND NATURALIZATION SERVICE,
DEPARTMENT OF JUSTICE, ST. PAUL, MINNE-
SOTA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 9, 1956

CERTIORARI GRANTED MARCH 26, 1956

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 676

CHARLES ROWOLDT, PETITIONER,

vs.

J. D. PERFETTO, ACTING OFFICER IN CHARGE,
IMMIGRATION AND NATURALIZATION SERVICE,
DEPARTMENT OF JUSTICE, ST. PAUL, MINNE-
SOTA

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**UNITED STATES DISTRICT COURT, DISTRICT OF
MINNESOTA, FOURTH DIVISION**

CHARLES ROWOLDT, Petitioner,

VS.

J. D. PERFETTO, Acting Officer in Charge, Immigration and
Naturalization Service, Department of Justice, St. Paul,
Minnesota, Respondent

PETITION FOR WRIT OF HABEAS CORPUS—Filed March 25,
1955

To the Honorable Judges of the United States District
Court, District of Minnesota, Fourth Division:

Your petitioner, Kenneth J. Enkel respectfully shows:

I

That he is the attorney for Charles Rowoldt, the petitioner above named and makes this petition for and on his behalf and at his specific request, as a result of knowledge obtained from said Charles Rowoldt and telephone conversations with a Mr. Stoltz of the United States Immigration and Naturalization Service, St. Paul, Minnesota.

II

That Charles Rowoldt is now imprisoned in restraint of his liberty by virtue of having been taken into custody on Tuesday morning, March 22, 1955, by the respondent, and at the present time is in the Ramsey County jail, St. Paul, Minnesota.

III

That the cause or pretense of the imprisonment and restraint is to effectuate his deportation from the United States pursuant to an Order of Deportation issued by the United States Immigration and Naturalization Service dated March 28, 1952.

[fol. 4]

IV

That said Charles Rowoldt and his said attorney was advised by said Mr. Stoltz of the St. Paul office of the United States Immigration and Naturalization Service that the petitioner would be put on an airplane on Wednesday morning, March 23, 1955, bound for New York, New York, and on Thursday, March 24, 1955 be put on a boat bound for Western Germany.

V

That said Charles Rowoldt had no notice whatsoever prior to being taken into custody this morning, March 22, 1955, that his actual deportation had been effectuated; that the Order of Deportation was issued almost three years ago and though every attempt to effectuate his deportation had been made by both the Immigration Service and Rowoldt himself, nothing came of it until his sudden detention of today as aforesaid; that presumeably the Western German government sent travel documents to the United States Immigration and Naturalization Service to enable Rowoldt to be deported to Western Germany but said Immigration Service gave no notice of that fact to Rowoldt before detaining him this morning, as aforesaid; that said Rowoldt is almost 70 years of age and has been a resident of the United States for almost 40 years, the past 30 of which were spent in Minnesota; that Rowoldt was ordered deported for past membership in the Communist party, said alleged membership having existed for a period of a few months in the depression years of the middle 1930s; that all his friends and acquaintances reside in and about Minneapolis, Minnesota and it will be a severe hardship on him to now be forced to start life anew in what is now a strange country to him even though he was born in Germany.

VI

That the imprisonment and detention of Charles Rowoldt is illegal in that it is for the purpose of effectuating an Order of Deportation, which Order is contrary to and in violation of the United States Constitution, thereby depriving Charles Rowoldt of his liberty and property without due process of law; that said imprisonment and deten-

tion is also illegal in that the procedures had herein, [fols. 5-14] wherein it was determined that said Charles Rowoldt be deported were contrary to and in violation of the United States Constitution, thereby depriving Charles Rowoldt of his liberty and property without due process of law; that said imprisonment and detention is also illegal in that, in view of the facts previously stated herein, it is an abuse of discretion on the part of respondent to so detain in custody said Charles Rowoldt, and such abuse of discretion is arbitrary, contrary to and in violation of the United States Constitution, thereby depriving said Charles Rowoldt of his liberty and property without due process of law.

VII

That no other application for a Writ of Habeas Corpus has been made for and on behalf of said Charles Rowoldt and further he has no adequate remedy except by this application.

Wherefore, it is prayed that a Writ of Habeas Corpus may issue as provided by law, to the end that said Charles Rowoldt may be released from his illegal imprisonment, and for such other and further relief as to the Court may seem just and proper.

Kenneth J. Enkel, Attorney for Charles Rowoldt,
608-10 Builders Exchange, Minneapolis 2, Minne-
sota.

Duly sworn to by Kenneth J. Enkel; jurat omitted in printing.

[fol. 15] UNITED STATES DISTRICT COURT DISTRICT OF MINNE-
SOTA, FOURTH DIVISION

[Title omitted]

RETURN

Comes now, the Respondent above named, J. D. Perfetto, Acting Officer in Charge, Immigration and Naturalization Service, Department of Justice, St. Paul, Minnesota, and

for his Return to the Order to Show Cause issued by the Honorable Gunnar H. Nordbye upon the Petition for Writ of Habeas Corpus in the above entitled matter states:

I

That he is the duly appointed, Acting Officer in Charge, Immigration and Naturalization Service, Department of Justice, St. Paul, Minnesota.

II

That Charles Rowoldt, the Petitioner above named, is in Respondent's custody and in the custody of the Attorney General of the United States such custody having been commenced on Tuesday morning, March 22, 1955; that such custody is not an imprisonment of the petitioner in restraint of his liberty but that such custody of the petitioner was then so taken for the purpose of accomplishing the deportation from the United States of America of the petitioner by reason of the authority, for the purposes and in the manner that is hereinafter set forth.

III

That said custody of the petitioner was taken and said deportation was being made and said custody continues for the purpose of accomplishing such deportation, all under and pursuant to a certain warrant dated April 16, 1952 issued by Joseph A. Cushman, Acting District Director, [fol. 16] Chicago District, Department of Justice by authority of the Attorney General of the United States and the Laws and Regulations applicable (See Act of October 16, 1918, as amended; see Alien Registration Act of 1940, 54 Stat. 670, 673, Sec. 23; and Subversive Activities Control Act of 1950, 64 Stat. 987, 1008, formerly 8 U.S.C. 137; Title 8 C.F.R. Part 150 and Sec. 150.3 and 150.4, 1950 Edition; Immigration and Nationality Act of 1952 and Sec. 405 thereof (8 U.S.C. 1251 and 1252 and note p. 156).

IV

(a) That said warrant was issued pursuant to an Order of Deportation duly made pursuant to proceedings duly held in accordance with the mandates of the law applicable

See Act of October 16, 1918, as amended (cited above), and Act of September 28, 1950, 64 Stat. 987, 1010.

(b) That attached hereto and made a part hereof as Exhibit "A", is a true, correct, and complete record and file of the proceedings so held, and action taken, after January 22, 1951, including a hearing on February 16, 1951, pursuant to a certain warrant issued at Philadelphia, Pennsylvania on the 17th day of April, 1947, by A. R. Mackey, Chief, Exclusion and Impulsion Section, Department of Justice, United States of America, said warrant appears in Exhibit "A" hereto attached immediately following the report therein of said hearing, and upon charges duly made. (See Exhibit "A").

(c) That said Exhibit "A" includes the following:

(1) A transcript of a hearing held by Robert E. Fuller, Hearing Officer, United States Department of Justice, Immigration & Naturalization Service, commencing on February 16, 1951, which hearing was, after the taking of some testimony, continued to, and held on March 28, 1951; the said transcript has attached thereto the Exhibits received in evidence by the hearing officer, being Exhibits 1, 2, 3, 4 and 5.

That Exhibit 1 to said transcript is a true and correct copy of the warrant referred to in Paragraph IV(b) above. (That the original of said warrant, with return thereon, appears in Exhibit "A" next to said Exhibit 1.)

That Exhibit 2 is a copy of Notice of Hearing to be held [fol. 17] at 10:00 A. M. on February 16, 1951, the original thereof having been mailed by registered mail to the petitioner on or about January 23, 1951 and indicating one Mr. Fuller as hearing officer.

Exhibit 3 attached to said transcript is a copy of Petition for Naturalization indicating the German nationality of the petitioner; this exhibit was received in evidence at page 12 of the transcript.

That it appears by said transcript with particular reference to Exhibits 4 and 5 thereof (which were received in evidence upon testimony at pages 20 to 25, and pages 28 to 35, respectively, of the transcript) that evidence was adduced at said hearing that petitioner had, subsequent to his admission to the United States, been a member of the

Communist Party and had been on the Executive Board of The Workers Alliance, had paid dues to the Communist Party and continued to be a member of the Communist Party until he was arrested in deportation proceedings in 1935 and that when he was arrested he finished the Communist party membership but stayed in the Workers Alliance (pages 5 and 6 of Exhibit 4 to said transcript, and Exhibit 5).

That it appears by said transcript that there was no evidence offered tending to disprove the evidence that petitioner was a member of the Communist Party; there was no evidence that petitioner had discontinued Communist Party activities or support; that respondent refused to testify in regard to his Communist Party membership.

Said Robert E. Fuller, as such hearing officer, did, at page 45 of said transcript, certify it to be a true report of everything that was stated during the course of the hearing.

Additional charges were lodged against petitioner at said hearing by the hearing officer, as appears at page 25 of the transcript, as follows:

"I now lodge an additional charge against the Respondent. The charge lodged is that the Respondent is in the United States in violation of the Act of October 16, 1918, as amended, in that he is found to have been after entry a member of the following class set forth in Section 1 of said Act: An alien who was a member of the Communist Party of the United States".

[fol. 18] (2) Exhibit "A" hereto includes the hearing officer's decision dated May 15, 1951, which recites the proceedings in the matter to the date thereof, and

(a) Finds that the respondent is an alien, a native and citizen of Germany; That he last entered the United States about 1923 or 1924, and That the petitioner was a member of the Communist Party of the United States in 1935.

(b) Contains his Conclusion of Law: "That the respondent Charles Rowoldt is subject to deportation under the Act of October 16, 1918, as amended, (See 40 Stat. 1012; 54 Stat. 679, 673; 64 Stat. 987, 1008) in that he is found to have been, after entry, a member of the following class set forth

in Section 1 of said Act: an alien who was a member of the Communist Party of the United States",

(c) As disposition holds that he, Charles Rowoldt, be deported pursuant to said conclusion of law.

(3) Exhibit "A" hereto includes exceptions taken by petitioner to the decision and order of the hearing officer.

(4) Exhibit "A" hereto includes the Order of A. C. Devaney, Assistant Commissioner of Adjudication dated November 27, 1951, ordering that the respondent be deported from the United States pursuant to law on the charge lodged at the said hearing.

(5) Exhibit "A" hereto includes a notice dated November 27, 1951, then sent by registered mail to petitioner's then counsel advising him of the decision and order of the said A. C. Devaney as Assistant Commissioner, Adjudication Division, Immigration and Naturalization Service, U. S. Department of Justice.

(6) Exhibit "A" hereto includes petitioner's notice of appeal therefrom to the Board of Immigration Appeals, dated December 13, 1951.

(7) Exhibit "A" hereto includes copy of notice to petitioner's then counsel dated January 10, 1952, of hearing of the matter to be held before the Board of Immigration Appeals January 31, 1952.

[fol. 19] (8) Exhibit "A" hereto includes transcript of oral argument before the Board of Immigration Appeals.

(9) Exhibit "A" hereto includes Order of the Board of Immigration Appeals dated March 28, 1952, reciting the facts applicable to the appeal; reciting that the appeal was based upon the attack of the constitutionality of the Internal Security Act of 1950, and upon the procedure followed in the hearing, which said Order states: That it is the conclusion that the petitioner has been afforded due process and that the hearing in his case complied with the requirements of a fair hearing; That the record sustains a finding that the petitioner has been a member of the Communist Party, and; That his deportation from the United States is mandatory, and orders that the appeal be dismissed.

V

That respondent's custody of the petitioner, Charles Rowoldt, is in all things in accordance with law for the purpose of accomplishing his deportation from the United States, as required by Title 8 U.S.C. Sec. 1251(a) (6), and by the Act of October 16, 1918, as amended, 40 Stat. 1017, see 64 Stat. 1008, and pursuant to proceedings held in accordance with the Act of February 5, 1917, 39 Stat. 874, as amended, see 64 Stat. 1010, and the Administrative Procedures Act, June 11, 1946, as amended (5 U.S.C. Chapter 19, See Sec. 1010), (64 Stat. 1048) said petitioner was duly determined to be and is a member of the following class: an alien who was a member of the Communist Party of the United States. (64 Stat. 1010, 1008; 54 Stat. 673).

VI

That said warrant, hereinabove referred to (Paragraph IV (a)), is attached hereto as Exhibit "B".

VII

That a passport for the purpose of accomplishing the petitioner's right to enter Germany is attached hereto as Exhibit "C", and that travel document for travel on the S. S. United States by the petitioner is attached hereto as Exhibit "D".

[fols. 20-21] Wherefore, Respondent prays that this Court determine that the respondent duly had and has custody of the petitioner for the purpose of accomplishing his deportation from the United States under and pursuant to a warrant duly issued after petitioner had been duly ordered deported following proceedings duly held in accordance with law for the purpose of determining whether petitioner is an alien subject to deportation, and further prays that the petition for a Writ of Habeas Corpus be denied and the Order to Show Cause hereinbefore issued be discharged.

Dated this 24th day of March, 1955.

George E. MacKinnon, United States Attorney;
Clifford Janes, Assistant United States Attorney,
Attorneys for Respondent.

Duly sworn to by J. D. Perfetto; jurat omitted in printing.

[fol. 22]

U. S. DEPARTMENT OF JUSTICE

Board of Immigration Appeals

DECISION OF BOARD OF IMMIGRATION APPEALS—March 28, 1952

File: A-5706210.

In re: Charles Rowoldt or Ludwig Karl Rowoldt.

In deportation proceedings.

In behalf of respondent: Carol King, Attorney, 220 Broadway, New York, New York, Isidore Englander, Esquire, 205 East 42nd Street, New York 17, New York, Heard on February 6, 1952.

Charges:

Warrant: Act of October 16, 1918, as amended—After entry, alien member of organization that advocates or teaches overthrow by force or violence, of Government of United States.

Lodged: Act of October 16, 1918, as amended—After entry, alien who was member of Communist Party of United States.

Application: Termination of proceedings.

Detention Status: Detained at Government expense.

Respondent is an alien, a native and last a citizen of Germany, sixty-eight years of age. He left Germany in 1914 and lived a few months in Canada. He entered the United States for permanent residence in 1914 and has lived here since, except for a short visit to Canada in 1924. He brought his wife from Germany, and they had a son born in this country. Both are now deceased. He has testified repeatedly that he was a member of the Communist Party for approximately six months in 1935. He has been refused American citizenship.

On July 21, 1936 this alien was ordered deported by the Board of Review, predecessor to this Board, on the ground that he was a member of the Communist Party. The Board was then informed by the State Department that the respondent had lost his German citizenship and a German

passport had been denied him. Therefore, on March 26, 1938 the Board of Review ordered that the case be filed until deportation became practical.

[fols. 23-35] On March 12, 1942 this Board ordered that the proceedings be cancelled on the ground that the alien was not a member of the Communist Party at the time of the hearing. The Supreme Court had held in *Kessler v. Strecker*, 307 U. S. 22, that the Act of October 16, 1918 did not apply to an alien who had ceased to be a member of the Communist Party, that it was only "present membership or present affiliation" which barred naturalization and required deportation. We said that the law had been changed by the Alien Registration Act of 1940 so that *past* membership made an alien deportable, regardless of his present status. However, that law did not apply to respondent, because the charges in the warrant of arrest issued against him were under the old law, and prior to the passage of the 1940 Act.

A new warrant was issued against the alien on April 17, 1947, containing charges under the Act of October 16, 1918, as amended by the Alien Registration Act of 1940. New hearings were accorded the alien, and in the course of those hearings another charge was lodged against him under the Act of October 16, 1918, as amended by the Internal Security Act of 1950. The Assistant Commissioner ordered that the alien be deported from the United States on the charge lodged at the hearing under the 1950 Act. The present order is based on past membership in the Communist Party. Past membership is ground for deportation under the 1940 and 1950 amendments to the 1918 Act. The alien appeals from that decision.

This appeal was based upon an attack on the constitutionality of the Internal Security Act of 1950, and upon the procedure followed in the hearings. On March 10, 1952 the Supreme Court determined the constitutionality of 1940 and the 1950 Act in the cases of *Harisiades v. Shaughnessy*, —U. S.— 20 Law Week 4173, *Carlson and others v. Landon* and *Butterfield, District Director v. Zydok*, —U. S.— 20 Law Week 4210. In these cases the Court also found that there was no basis for the procedural objections which were similar to those made in the present case. It is our con-

clusion that respondent has been afforded due process and that the hearings in his case complied with the requirements of a fair hearing.

The record sustains a finding that the respondent has been a member of the Communist Party. His deportation from the United States is mandatory.

Order: It is ordered that the appeal be dismissed.

Thos. G. Finucane, Chairman.

MBMeC:hc, MBMeC.

[fol. 36] UNITED STATES DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

DECISION OF CHIEF AT ADJUDICATIONS DIVISION—November
27, 1951

Appeal 15

File: A-5706210—Chicago (1625-P-12651).

In re: Charles Rowoldt or Ludwig Karl Rowoldt.

In deportation proceedings.

In behalf of respondent: Kenneth J. Enkel, Esquire, 954
Builders Exchange Building, Minneapolis 2, Minnesota.

Charges:

Warrant: Act of October 16, 1918, as amended—After entry, alien member of organization that advocates or teaches overthrow, by force or violence, of Government of United States.

Lodged: Act of October 16, 1918, as amended—After entry, alien who was member of Communist Party of United States.

Application: Termination of proceedings.

Detention status: Released on parole.

Discussion: Upon consideration of the entire record, including the exceptions taken, the recommended order of the officer conducting the hearing is hereby adopted.

In view of our finding of deportability on the 1918 Act charge lodged at the hearing, we see no reason for discussing the charge stated in the warrant of arrest.

Counsel for respondent has submitted a bill of exceptions. Therein exception is taken to the finding that respondent is a citizen of Germany, and to the finding that respondent was a member of the Communist Party of the United States. Counsel also objects to the conclusion of law that respondent is deportable under the provisions of the Act of October 16, 1918, as amended.

Respondent has testified in these proceedings that he was born in Germany, and did not become a citizen of any other country. The record contains a certified copy of respondent's petition for naturalization to the United States District Court of Minnesota, Minneapolis, Minnesota, filed on April 8, 1942, and numbered 12651. This petition, signed [fol. 37] and sworn to by respondent, states his present nationality to be German. On January 10, 1947, respondent made a sworn statement before an officer of this Service, at Minneapolis, Minnesota. During the course of that interrogation respondent stated his citizenship to be German. In his petition for a writ of habeas corpus, addressed to the United States District Court, State of Minnesota, 4th Division, on November 4, 1949, respondent asserted that he is a citizen of Germany. In the light of the foregoing evidence, it seems abundantly clear to us that the record establishes that respondent is in fact a citizen of Germany.

In his sworn statement of January 10, 1947, discussed supra, respondent admitted that he joined the Communist Party at Minneapolis in the Spring or Summer of 1935, and that he remained a member thereof until the end of 1935. In his above-mentioned prayer for the issuance of a writ of habeas corpus, respondent pleads that he ceased to be a member of the Communist Party of the United States in 1935. In these expulsions proceedings respondent refused to answer the question as to whether he had ever been a member of the Communist Party of the United States, on the ground of self-incrimination. It is beyond cavil that the record contains evidence which is legally admissible, substantial, reliable, and probative, and which fully sustains a finding that respondent was in 1935 a member of the Communist Party of the United States. He is

therefore deportable under the provisions of the Act of October 16, 1918, as amended.¹

[fol. 38] It is the claim of counsel that respondent has been denied due process of law, in that there has been a lack of adherence to the minimum standards of impartiality as required by law. Objection is made to the qualification of the hearing officer to accord respondent a disinterested and impartial hearing or to render a disinterested and impartial decision. Counsel points to the fact that the hearing officer is an employee of the Immigration and Naturalization Service. He alleges that this officer is thereby subject to its control and jurisdiction. In addition, counsel challenges the hearing officer who, he asserts, has acted as a prosecuting officer on behalf of the Government in cases in-

¹ The Act of October 16, 1918, was amended by the Internal Security Act of 1950, effective September 23, 1950 (P. L. 831—81st Congress; Chapter 1024—2nd Session, H.R. 9490; 64 Stat. 987 et seq.). Section 22 of the 1950 amendment devises Section 4(a) of the 1918 Act to read:

“Sec. 4. (a) Any alien who was at the time of entering the United States, or has been at any time thereafter, a member of any one of the classes of aliens enumerated in . . . section 1(2) of this Act, shall, upon the warrant of the Attorney General, be taken into custody and deported in the manner provided in the Immigration Act of February 5, 1917. The provisions of this section shall be applicable to the classes of aliens mentioned in this Act, irrespective of the time of their entry into the United States.”

Section 1(2) of said Act reads; in pertinent part:

“(2) Aliens who, at any time, shall be or shall have been members of any of the following classes: . . .
(C) Aliens who are members of or affiliated with (i) the Communist Party of the United States . . .”

In other words, the 1918 Act, as amended, requires the deportation of any alien who was, at any time after his entry into this country, a member of the Communist Party of the United States.

volving the same fundamental issues as present in the instant proceedings.

The conduct of the hearing officer was bound by the provisions of 8 C.F.R. 151.2(b), effective November 10, 1950 (published 15 F.R. 7637, November 10, 1950), which set forth the general duties of the hearing officer. It is stated, in pertinent part:

“(b) *Hearing officer; general duties.* The hearing officer shall conduct a fair and impartial hearing. He shall use his independent judgment in rendering his decision and shall not perform any duties inconsistent with the duties and responsibilities of an adjudicating officer. . . .”

In the instant case, there is no evidence that the hearing officer consulted any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; or that the hearing officer engages in the performance of investigative or prosecuting functions; or that he is responsible to, or subject to the supervision or direction of, any federal officer engaged in the performance of investigative or prosecuting functions; or that any person, other than the hearing officer, participated in or advised in the decision of the hearing officer.

[fol. 39] The basis for disqualification of a judge is that he has personal bias or prejudice against one, or in favor of the opposite, party by reason of which he is unable to exercise impartially his functions in the particular case. *Eisler v. United States*, 170 F.(2d) 273 (1948), 83 U.S. App. D.C. 315, cert. dism. 338 U.S. 883 (1949). In the instant case, there is no evidence of any personal bias or prejudice on the part of the hearing officer, either in favor of the Government or against respondent.

As to the complaint of counsel that the hearing officer has been previously engaged as prosecutor for the Government, it is well settled that a judge is not disqualified from presiding at the trial of a case merely because he had formerly acted as attorney for one of the parties in other cases. *Duncan v. Atlantic Coast Line R. Co.*, 223 F. 446 (D.C., S.D. Ga., 1915). *Carr v. Fife*, 156 U.S. 494 (1895). We find that the hearing officer who presided at the instant hearing was qualified to conduct a fair and impartial

hearing and to render a fair and impartial decision, and we further find that he has so done.

The contention has been advanced by counsel that respondent was denied due process of law in that respondent was not advised or informed of the charge he was required to meet until after the conclusion of the Government's case. As a result, counsel argues, respondent was not afforded an adequate opportunity to meet the lodged charge.

We find that the charge in the instant proceeding was properly lodged by the examining officer, in accordance with 8 C.F.R. 151.2(f), which states, in part:

" . . . The examining officer shall . . . lodge such additional charges as he may find to be applicable.

The record clearly refutes counsel's complaint that respondent was denied ample opportunity to meet the lodged charge. The record discloses that immediately upon the lodging of the charge at the hearing held on February 16, 1951, counsel requested, and was granted, a continuance. The proceedings were resumed on March 28, 1951. It is abundantly clear that respondent was afforded sufficient time and opportunity to prepare and present a refutation.

The constitutionality of the Act of October 16, 1918, as amended, has been challenged by counsel. Determination of the constitutionality of a statute enacted by the Congress is not within the province of this Service. That is strictly a judicial function. *Panitz v. District of Columbia*, 112 [fols. 40-45] F.(2d) 39, 42 (C.A.D.C., 1940). *Todd v. Securities and Exchange Commission*, 137 F.(2d) 475, 478 (C.A. 6, 1943). Nevertheless, we feel that comment should be made that it has been judicially determined that an immigration law may be retrospective in its application to an alien. *Mahler v. Eby*, 264 U.S. 32, 39 (1924). *United States ex rel. Lubbers v. Reimer*, 22 F. Supp. 573 (D.C., S.D.N.Y., 1938).

Order: It is ordered that the alien be deported from the United States, pursuant to law, on the charge lodged at the hearing.

A. C. Devaney, Assistant Commissioner, Adjudications Division.

AG:cam, S.I.

[fol. 46] UNITED STATES DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

1014 New Post Office Building

St. Paul, 1, Minnesota

HEARING OFFICER'S DECISION—May 15, 1951

In re: Charles Rowoldt, formerly, Ludwig Karl Rowoldt,
A-5 706 210

Charges:

Warrant: Act of October 16, 1918, as amended—Found to have been, after entry, a member of the following class set forth in Section 1 of said Act: An alien who is affiliated with an organization, association, society, or group that advises, advocates or teaches the overthrow by force or violence, of the Government of the United States.

Lodged: Act of October 16, 1918, as amended—Found to have been, after entry, a member of the following class set forth in Section 1 of said Act: An alien who was a member of the Communist Party of the United States.

Summary of the Evidence:

The warrant of arrest charging that the respondent has been found in the United States in violation of the immigration laws thereof, as set forth above, was issued on April 17, 1947, and served on November 26, 1948. (Ex. 1) A prior hearing under this warrant of arrest was invalidated by the decision of the United States Supreme Court in *Sung v. McGrath* on February 20, 1950 (339 U. S. 33), because it had been held without regard to the provisions of Sections 5, 7, and 8 of the Administrative Procedure Act of 1946. On September 23, 1950, Congress passed the Internal Security Act of 1950, Section 22 of which further amends the Act of October 16, 1918. On September 27, 1950, Public Law 843 of the 81st Congress was approved, which exempted proceedings under law relating to the expulsion of aliens from the provisions of Sections 5, 7, and 8 of the Administrative Procedure Act of 1946. The hear-

ing in these proceedings was held in St. Paul, Minnesota, on February 16, 1951, and March 28, 1951. It was conducted, and this decision is being prepared, pursuant to the regulations as amended, after approval of Public Law 843, supra. 8 C.F.R. 151. The second deportation charge above was lodged during the hearing on February 16, 1951, (p. 25), based upon the amendment to the Act of October 16, 1918, which is contained in Section 22 of the Internal Security Act of 1950.

[fol. 47] At the hearing held on February 16, 1951, the respondent testified that he was born in Germany on July 19, 1883; that his parents were natives and citizens of Germany and never resided in the United States; that he is not a citizen of any country, but was last a citizen of Germany; and that he has never become a citizen of any other country. (pp. 8, 9, 10, 11) The respondent emigrated to the United States from Hamburg, Germany, and entered the United States for permanent residence at New York, New York, on February 1, 1914, on the SS "Pretoria". (p. 12 and Ex. 3) He testified that, since February 1, 1914, he was absent from the United States in Canada for several weeks and returned to the United States through Portal, North Dakota, in the early twenties. (pp. 12, 13, 14).

The respondent stated in a recorded examination under oath at Minneapolis, Minnesota, on January 10, 1947, in answer to questions by Leonard L. Adams, a Special Inspector of the Immigration and Naturalization Service, that he is a native and citizen of Germany; that he last entered the United States at Portal, North Dakota, in or about 1924; that he joined the Communist Party in Minneapolis in the spring or summer of 1935 and remained a member until the end of 1935; and that, as a member of the Communist Party, he ran the Communist Party book store in Minneapolis for awhile. (Ex. 4 at pp. 4, 5, 6, 8)

Exhibit 5 is a certified copy of the petition for a writ of habeas corpus of Charles Rowoldt against Irvin F. Shrode, Officer in Charge, St. Paul Office, Immigration and Naturalization Service, Department of Justice, dated and verified on November 4, 1949, and filed in the United States District Court, State of Minnesota, Fourth Division, on November 8, 1949. The respondent refused to answer whether he filed such petition. (pp. 30-33) Exhibit 5 is con-

nected with the respondent, adequately by each, by the identity of the signature of Charles Rowoldt on the Verification of the above petition with the signature of Charles Rowoldt on page 11 of Exhibit 4, which latter the respondent admitted was his signature (pp. 20 & 21), and by the record as a whole; in particular by identity of name, warrant, birth, entry, and employment. The respondent stated in this petition for a writ of habeas corpus, which was verified by him under oath, that he is a native and citizen of Germany; that he last entered the United States at Portal, North Dakota, about November, 1923; and that, "in truth and in fact", he ceased membership in the Communist Party of the U.S.A. in 1935.

At the hearing held on March 28, 1951, the respondent refused to answer whether he has ever been a member of the Communist Party of the United States and whether he has ever been a member of the Communist Party of the United States in 1935, on the ground that the answers might possibly incriminate him. (pp. 35-39).

[fol. 48] I find that the testimony of the respondent in the instant proceedings and Exhibit 4 and Exhibit 5, each separately supports a finding that the respondent is an alien, a native and citizen of Germany, who last entered the United States at Portal, North Dakota, in or about 1923 or 1924, and that Exhibit 4 and Exhibit 5, each separately supports a finding that the respondent was a member of the Communist Party of the United States in 1935.

Section 4 of the Act of October 16, 1918, as amended by Section 22 of the Internal Security Act of 1950, provides:

"Sec. 4(a) Any alien who was at the time of entering the United States, or has been at anytime thereafter, a member of any one of the classes of aliens enumerated in * * * Section 1(2) of this Act, shall, upon the warrant of the Attorney General, be taken into custody and deported in the manner provided in the Immigration Act of February 5, 1917. The provisions of this section shall be applicable to the classes of aliens mentioned in this Act, irrespective of the time of their entry into the United States."

Section 1(2) of the Act of October 16, 1918, as amended by Section 22 of the Internal Security Act of 1950 reads in pertinent part:

"That any alien who is a member of any one of the following classes shall be excluded from admission into the United States:

(2) Aliens who, at anytime, shall be or shall have been members of any of the following classes:

(C) Aliens who are members of or affiliated with (i) the Communist Party of the United States,

I conclude that the evidence of record sustains the lodged charge of deportability because of former membership in the Communist Party of the United States after entry into the United States. I deem it unnecessary to make findings as to the other charge.

By the provisions of Subsection (d) of Section 19 of the Act of February 5, 1917, as amended, the respondent is ineligible for relief from deportation under the provisions of Subsection (c) of Section 19 of that Act, because he is [fols. 49-99] deportable under the Act of October 16, 1918, as amended. The respondent has specified Germany as the country to which his deportation is to be directed, in the event his deportaion is required by law. (p. 45)

Findings of Fact

* Upon the basis of the evidence presented, it is found:

(1) That the respondent is an alien, a native and citizen of Germany;

(2) That the respondent last entered the United States in or about 1923 or 1924;

(3) That the respondent was a member of the Communist Party of the United States in 1935.

Conclusion of Law

Upon the basis of the foregoing findings of fact, it is concluded:

That the respondent is subject to deportation under the Act of October 16, 1918, as amended, in that he is found to have been, after entry, a member of the following class set forth in Section 1 of said Act: An alien who was a member of the Communist Party of the United States.

Disposition: That the respondent be deported from the United States pursuant to law on the following charge:

The Act of October 16, 1918, as amended, in that he is found to have been, after entry, a member of the following class set forth in Section 1 of said Act: An alien who was a member of the Communist Party of the United States.

Robert E. Fuller, Hearing Officer.

May 15, 1951.

[fol. 100] STATEMENTS OF CHARLES ROWOLDT GIVEN BEFORE SPECIAL INSPECTOR LEONARD L. ADAMS AT MINNEAPOLIS, MINNESOTA, ON JANUARY 10, 1947

Examination conducted in the English language.

Inspector to Deponent: You are informed that I am a United States Immigrant Inspector authorized by law to administer oaths in connection with the enforcement of immigration and naturalization laws. I desire to question you relative to your right to be and remain in the United States. You are further informed that any testimony which you give at this time may be used against you in any proceeding which the Federal Government may institute. Do you understand?

A. Yes.

Q. With that understanding and under those conditions, are you willing to give testimony?

A. I no longer desire to stay in the United States any longer than I have. I am going back to Europe as soon as

I can settle my affairs in this country. I am no longer interested in even getting my citizenship papers. You can write this all down so you can see that I am honest about it. You have noticed that I never fought hard to get my citizenship papers.

Q. Let me interrupt. This statement, as I have informed you, has reference to your right to be and remain in the United States. Will you please advise whether under the conditions which I have stated, you are willing to give testimony? I want to question your right to be and remain in the United States, as I told you, and then I asked whether or not you are willing to give testimony at this time.

A. I can see no testimony necessary in my case. I am doing nothing else but working in the United States.

Q. However, I do desire, as I have stated, to question your right to be and remain in the United States, and I ask at this time whether or not you are willing to give testimony. Can you answer that?

A. I told you just now. I don't want to give testimony whatsoever on that Communist stuff again. That is finished for me as far as I am concerned. I am telling you that I have been working here 32 years—since 1914, and you can ask me what kind of work you are doing, how much wages you are getting, does your boss like you, but I don't want to be asked anything else about politics because I am not interested. I am too old to be interested. I am not interested whether the Republicans get in office, or the Democrats, or the Communists, or the Socialists. I do not want anything else to be asked because I don't want to be in this country. I am just in this country for the people's benefit. I am working and paying taxes all the time for them. Why should I go through this and get trapped through your questioning? I do not want to be asked anything about politics. It is 10 years ago now. I don't care what they have in their minds. I don't want to answer any trapping questions. If they don't want me in this country, they can take me and ship me any time. I have never fought hard for my citizenship papers. I will tell you [fol. 101] this. This is not new, my wanting to go back to the old country. When we came to the shores of America, and my little wife, she came 1½ years later, always said

she wanted to go back to Germany. I had always had in mind to go back to the old country. Then came all this trouble, and I couldn't go back. This is the reason I didn't fight hard for my citizenship papers. Now that swine Hitler is out of the way, I am going back and spending my last years in my own language country. I don't want to have anything to do with any politics. Write that back to them, Mr. Adams. I don't care for citizenship papers because I always had in my mind to go back to Germany. I don't need them now and I don't want to be asked any questions about them now—Communist questions—why should I answer such questions now.

Q. Mr. Rowoldt, I gather from what you say that you have always had in mind returning to Germany?

A. Always since I came to these shores. Of course it might have never been possible. It was not possible for many, many years, but it was always that longing.

Q. Mr. Rowoldt, are you willing to make such a statement under oath?

A. Under oath? Why not? I can swear to this because it was always in me all the time—because I had that longing in me all that time.

Q. (Attempt made to take oath.)

A. I won't swear to anything.

Q. When you filed your petition for naturalization on April 6, 1942, did you at that time have in mind returning to Germany?

A. No, I might have had in mind, but Hitler was ruling that country. I surely would not go back to Hitler. Now I took up that thought, now that a fellow can visit his people proudly.

Q. When do you intend to return to Germany? Have you any plans?

A. I thought—this is '47, probably in '48 or so, in a couple, three years. I now have that in my mind. I might die before that. I am thinking now in a year or two or three, it might be possible to go over there. That is the way I am thinking now. That is why I wanted to tell you right off the bat, not to worry about the citizenship papers. I now have a chance to go for the last few years which I am living, back to my own land; and I probably can find a little easier work.

I have a pretty good education in my own language. Here I have to work as a slave in my old days.

Q. Do you, at this time, have intentions of pressing to a completion, your petition for naturalization?

A. No, I have no intention of pressing. If they give it to me, good and well—that is why I never pressed—all these years.

Q. If you were to be heard in court today on your petition for naturalization, could you, in all good faith, take the oath that it is your intention to reside permanently in the United States?

A. No, I couldn't say that because I have my mind set to go back to Germany.

[fol. 102] Q. Do you at this time desire to request a dismissal of your petition for naturalization?

A. No, not exactly. I do not ask dismissal.

Q. Are you willing to sign this statement, as given?

A. Yes.

Charles Rowoldt.

Leonard L. Adams, Special Inspector.

I hereby certify that the foregoing pages 1 thru 3 incl. are a true transcript of my notes taken at Minneapolis, Minnesota, on January 10, 1947, and are recorded in my shorthand book #5.

Ruth F. Simos, Stenographer.

[fol. 103] Further testimony given by Charles Rowoldt before Special Inspector Leonard L. Adams at Minneapolis, Minnesota on January 10, 1947.

Inspector to Deponent: As I understand you, Mr. Rowoldt after reading the statement you previously gave, which you signed, you are now willing to give a statement under oath. Is that correct?

A. Yes.

Q. Will you please stand and be sworn. Do you solemnly swear that all the statements you are about to make in this proceeding will be the truth, the whole truth and nothing but the truth, so help you God?

A. I do.

Q. What is your full and correct name?

A. Ludwig Karl Friedrich Martin Rowoldt.

Q. You are known by what other name?

A. In America I am known as Charles Rowoldt.

Q. What is your address?

A. 53 North 12th Street, Minneapolis.

Q. What is your occupation?

A. Houseman at the Dyckman Hotel, Minneapolis, Minnesota.

Q. When and where were you born?

A. I was born July 19, 1883 at Dorf, Tatschow, Post Office Schwaam, Mecklenburg-Schweirn, Germany.

Q. Are your parents living?

A. I don't think so. I haven't heard from them.

Q. What was your father's name and place of birth?

A. Friedrich Rowoldt—he might have been born in Reimzhagen, Mecklenburg, Germany.

Q. Of what country was your father a citizen?

A. Of Germany.

Q. What was your mother's maiden name and her place of birth?

A. Marie Gippe, born in the same place where I was born in Germany.

Q. Did either of your parents ever reside in the United States?

A. No.

Q. Were either of your parents ever citizens of the United States?

A. No.

Q. Of what country are you a citizen?

A. Germany

[fol. 104] Q. According to the records of this Service, you filed petition for naturalization on April 8, 1942, in U. S. District Court, Minneapolis, Minnesota. Is that correct?

A. Yes.

Q. Also, according to this file, your arrival at New York on February 1, 1914 ex SS Pretoria under the name Ludwig Rowald was verified. Is that arrival information correct?

A. Yes.

Q. Have you ever left the United States since your arrival?

A. I went over in the twenties, threshing for a few days in Canada.

Q. What year was that?

A. Approximately in the early twenties. That is the only time I went over the border from the United States.

Q. Where did you reenter the United States from Canada?

A. At Portal, North Dakota.

Q. How were you travelling at the time of this reentry?

A. I was travelling with a private Ford car.

Q. Were you inspected by an immigration officer at the time of this entry?

A. Surely, we went back through the immigration office.

Q. How long were you in Canada at that time?

A. Four or five weeks.

Q. Can you give me a better idea of the year this occurred?

A. There is no way of establishing the correct year now. I said before, it was in 1924.

Q. You believe this to be the approximate date?

A. That is about correct.

Q. Were you ever refused admission to the United States?

A. No.

Q. Have you ever been deported from the United States?

A. No.

Q. Have you ever been arrested or in jail for any crime or offense anywhere?

A. No, except the time in 1935 I was arrested in deportation proceedings.

Q. Are you a member of any organizations or societies of any kind at the present time?

A. Yes, I belong to the A.F.L. Local No. 665, Miscellaneous Hotel & Restaurant Workers.

Q. To what organizations have you belonged in the past?

A. In the past, the Workers' Alliance, the Communist Party.

[fol. 105] Q. When did you join the Workers' Alliance?

A. In the spring or summer of 1935, I joined both the Workers' Alliance and the Communist Party.

Q. Where did you join these organizations?

A. In Minneapolis.

Q. Did you hold any office in either of these organizations?

A. Not in the Communist Party but in the Workers' Alliance, I was on the Executive Board, and once in a while I was secretary for some local.

Q. What — the purpose of your joining the Communist Party at that time?

A. We had no books then, just paid dues, and somebody collected.

Q. Did you carry a party dues book at that time?

A. No, but in the Workers' Alliance we had dues books.

Q. Did you carry a Communist Party card at that time?

A. I don't think we had cards at all.

Q. For how long were you a member of the Communist Party?

A. From then on until I got arrested and that was at the end of 1935. When I was arrested, I finished the Communist Party membership, but I stayed in the Workers' Alliance.

Q. How long did you continue your membership in the Workers' Alliance?

A. Probably a couple of years longer—then it dissolved itself.

Q. What — the purpose of your joining the Communist Party?

A. The purpose was probably this—it seemed to me that it came hand in hand—the Communist Party and the fight for bread. It seemed to me like this—let's put it this way—that the Communist Party and the Workers' Alliance had one aim—to get something to eat for the people. I didn't know it was against the law for aliens to join the Communist Party and the Workers' Alliance. I found that out when Mr. Adams told me.

Q. What were your political beliefs at the time you joined the Communist Party?

A. My political beliefs were always somewhat for the benefit of most of the people—always for the benefit to help most of the people.

Q. Apparently you were a member of the Communist Party for approximately one year. Is that correct?

A. Yes, probably something like that.

Q. What is your present attitude towards Communism. How do you feel about that?

A. I explained that a couple of years ago to those people

over there (indicates Mr. C. A. Frederickson). I believe today, and this is my honest opinion, I believe today that Communism and Capitalism, as we call it, will come together in spite of all the world war threats, and even preparations—to solve their problems, thus a better world without a third world war. That is my opinion today and that much hope I have in the statesmen of the world today. That is the best way I can put that. That is my honest belief.

[fol. 106] Q. What is your belief and understanding of the principles of communism?

A. If you read Marx or any of the writers of Lenin and Stalin, you will find this—that out of a world of struggle between two classes will emerge finally—first it will be a dictatorship, totalitarian, which, as time goes by, will wither and regulate the economics of the world for the benefit of all people, which were formerly rich or poor.

Q. Is it your opinion that before communism and a capitalistic form of government will be able to exist in the same world, that a dictatorship must necessarily evolve from a capitalistic form of government?

A. I answered that before. I said that Hitler was such a dictatorship of capitalism, that is what he didn't want. Now Hitler is overthrown and the main obstacle of the progressive form of march in the world has been more secured, I don't think it is necessary that a capitalistic dictatorship has to come because progressive forces in the capitalistic countries of today will eventually be able to cooperate with the communistic forces, and settle in more or less a peaceful manner, the business of the world. That is my honest opinion. Men come and go, and the people always stay. The people finally, in the last analysis, want peace and security. They will find a representative who will take care of that.

Q. Let me ask you this. What is your opinion as to the form of government which today we have in the United States?

A. As far as I have found in the world, the American system of government, as far as the capitalistic system is concerned and even the communistic, is still the best in the whole world, including the communistic system, because there is not a good one yet.

Q. Are you of the opinion that our form of government is perfect?

A. No, of course not, but we have a Constitution which is almost perfect, and by that measurement, we can make it perfect.

Q. Do you think that the Constitution under which we reside in the United States should be changed in any way, other than by the vote of the people?

A. No, the Constitution should not be changed by just a man or two. The people of the United States should have the say in that.

Q. Do you have any opinion as to whether or not this country is headed for a change in the form of government?

A. I can't have no opinion on that. For the time being there is no such thing.

Q. Do you have an opinion as to whether or not a form of government should be changed in any way other than by the will of the people?

A. A form of government should not be changed in any way except by the will of the great majority of the people. I think President Lincoln said that.

Q. If a minority people of a government desire a change in the form of their government, do you think it would be wise and advisable to resort to force?

A. No, that would not be wise or advisable. No, a minority should not go against the majority by forcing violence. [fol. 107] Q. Do you think it would be the right of a majority of people residing under a government to overthrow the government by force?

A. No, not by force either. They should be able to do it peacefully, not by force.

Q. Were you an active worker in the Communist Party?

A. The only active work I did was running the bookstore for a while.

Q. Where did you run a bookstore?

A. 241 Marquette, Minneapolis.

Q. What sort of bookstore was it?

A. Oh, all kinds of literature—all kinds of writers in the whole world—Strachey, Marx, Lenin's writing and others. Socialism and all that stuff.

Q. Did you own the bookstore?

A. No, I didn't get a penny there.

Q. What was the arrangement there?

A. I was kind of a salesman in there, but the Communist Party ran it.

Q. You secured this employment through your membership in the Communist Party?

A. Yes.

Q. Was this store an official outlet for communist literature?

A. Yes.

Q. What is your opinion of a revolution, such as occurred in Russia when the Communists obtained power?

A. What is my opinion of the Russian revolution—that is about it. As much as I know about it, the Russian revolution, in my opinion, is this. It seemed that at the end of the war of 1914, the Russian middle-class especially and the Russian soldiers were sick and tired of being double-crossed and betrayed by their generals and what not (they went in with the Germans). Russian soldiers spilled their blood running against the Germans without ammunition, and there was chaos in the country. I said middle-class—that they organized and succeeded in overthrowing that particular leadership which was headed by the Czar. But this is my opinion. This was under the leadership of Kerensky. Seemingly, Lenin and his followers which represented more the lower peasant and factory workers, were not satisfied with this set-up, and kept on working for another revolution which finally overthrew the whole upper class in the fall of 1918, and so divorced themselves for the first time in world's history, economically and politically, from the rest of the world. That is the way I see it. That is my opinion on that.

Q. Do you advocate change of government by force or violence?

A. No, never did.

Q. Do you feel that the present government of the United States will ever be overthrown by force or violence?

A. On account of our Constitution and the very intelligent American people, we don't have to do that.

[fol. 108] Q. Do you have any opinion as to whether or not it will ever occur?

A. It could because after all, nobody can see into the future, but I don't believe it could.

Q. At the present time, are you in sympathy with the principles of communism?

A. Communism doesn't tell me anything. Communism nor capitalism don't tell me anything. I am a progressive, and I want to see a better world. If I don't see it in this life, because I believe in reincarnation, I hope to see it when I come back—where all people can get to the resources of this life—that means education and life as we should have it. I like some of the sayings of Jesus. He said that he wanted that all people should be helped. Principles of communism and capitalism doesn't mean anything to me. They have too many points—first, dictatorship, hit the other fellow down.

Q. Do you feel that communism is a better or poorer form of government than a democracy?

A. The communistic government, as we know it now, is not better than a capitalistic government as we know it. It is not better.

Q. Do you feel that communism can ever replace and be a better form of government than a democracy?

A. That is a question to which it is hard to answer because we cannot see into the future. The only way that I could answer that is—the trend in the world today seems to be to some sort of change, like socialism or communism, and if that trend should continue to engulf the whole world, it would be up to the people to make whatever develops out of it—a real government for themselves, which would be better than what capitalism today gives them.

Q. Do you believe, without reservation, in the form of government we have in the United States today?

A. Yes, I believe, without reservation, in the form of government we have in the United States today. It is good enough for me.

Q. Do you feel that your beliefs in government have changed during the past ten years, that is, since you terminated membership in the Communist Party?

A. Yes, it has changed to that extent—that I began thinking for myself instead of following somebody else tell-

ing me things. I found that nothing can be broken over a knee, and that any government that exists today as a right to exist as it is—by the power of the majority of a nation's people. Nobody in the world can say there are no changes. We must always consider changes. They can be made when the people see that it is the right time for it, and at that time they will have their representatives which will take care of it. I am absolutely against sudden dictatorship and overthrow of government.

Q. Again referring to your joining the Communist Party in 1935, was this motivated by dissatisfaction in living under a democracy?

A. No, not by that. Just a matter of having no jobs at that time. Everybody around me had the idea that we had to fight for something to eat and clothes and shelter. We were not thinking then—anyways the fellows around me, of overthrowing anything. We wanted something to eat and something to crawl into.

[fol. 109] Q. You say "fight for something to eat and crawl into". What do you mean by that term?

A. We had to go and ask those who had it—that was the courthouse at that time. We petitioned city, state and national government. We did and we succeeded. We finally got unemployment laws and a certain budget. Even at the few communist meetings I attended, nothing was ever said about overthrowing anything. All they talked about was fighting for the daily needs. That is why we never thought much of joining those parties in those days.

Q. What is your opinion as to whether communism was the cause or outgrowth of the Russian revolution?

A. Communism did not start the revolution. The middle-class started the revolution. Lenin got hold of it. Communism was the result of the revolution.

Q. Were you an organizer for the Communist Party?

A. No.

Q. What is your personal belief as to the principles of communism?

A. What is communism? That is a good question. My belief is a different thing than communism is. According to Marx and Lenin and as I have seen the Communists working, since I knew of them, they are aiming, more or less, with forever methods to set up an economic system

to get the people out of a monopoly control on to their own economic feet. That is the way I see them working now.

Q. What is the extent of your education?

A. Something like high school in Germany.

Q. Where in Germany?

A. I went to school in this particular Schweirn, and Rostock. Also in Hamburg.

Q. What church did you attend in Germany?

A. Lutheran.

Q. Do you know when and where you were baptized?

A. Cambs, Mecklenburg, Germany.

Q. How many times have you been married?

A. Once.

Q. When and where were you married?

A. We married on December 31, 1912 in Wahren-Leipzig to Jennie Sterz.

Q. She passed away?

A. She passed away on November 11, 1918 in Chicago, Illinois.

Q. Do you have any children?

A. I had one son, Walter, who was born in Chicago, on July 22, 1915. He died in Minneapolis on February 18, 1928.

Q. Have you any relatives in the United States?

A. No.

[fols. 110-119] Q. Have you any relatives remaining in Germany?

A. I don't know anyone now.

Q. Who did you have in Germany?

A. I had two brothers and one sister, but I never heard from them. I had uncles, but they must all be dead.

Q. Do you own any property anywhere?

A. I own a little piece of land outside of town—four acres of land outside of town.

Q. Do you have a passport or any other document identifying you as a native of Germany?

A. I don't have anything right now in my possession.

Q. Have you registered under the Alien Registration Act of 1940?

A. Yes, my number is 75706210.

Q. According to the office file in your case, you also

obtained a Certificate of Identification as a citizen of Germany?

A. Yes, I had that too.

Q. Are you registered under Selective Service?

A. Yes, I also have that.

Q. Are you willing to sign this statement when transcribed?

A. I will come down next Tuesday morning, January 14, 1947, to sign it.

Charles Rowoldt.

Leonard L. Adams, Special Inspector.

I hereby certify that the foregoing pages 4 thru 11 incl. are a true transcript of my notes taken at Minneapolis, Minnesota, on January 10, 1947, and are recorded in my shorthand book #5.

Ruth J. Serrios, Stenographer.

[fols. 120-165] UNITED STATES OF AMERICA

Department of Justice

Washington

WARRANT OF DEPORTATION OF ALIEN—April 16, 1952

No. 1625/P-12651, A5 706 210

To: Officer in Charge, Immigration & Naturalization Service, St. Paul, Minn.

Or to any Officer or Employee of the United States Immigration and Naturalization Service.

Whereas, after due hearing before an authorized Hearing Officer, and upon the basis thereof, an order has been duly made that the alien Charles Rowoldt, or Ludwig Karl Rowoldt who entered the United States at Portal, N. D. on about the 1st day of Nov 1924 is subject to deportation under the following provisions of the laws of the United States to wit:

The Act of October 16, 1918, as amended, in that he has been, after entry, a member of the following class set forth

in Section 1 of said Act: An alien who was a member of the Communist Party of the United States.

I, the undersigned officer of the United States, by virtue of the power and authority vested in the Attorney General under the laws of the United States and by his direction, do hereby command you to deport the said alien to Germany at the expenses of the appropriation, Salaries and Expenses, Immigration and Naturalization Service, 1952.

For so doing this shall be your sufficient warrant.

Witness my hand and seal this 16th day of April 1952.

Joseph A. Cushman, Acting District Director, Chicago District.

[fols. 166-186] UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

FOURTH DIVISION

[Title omitted]

Transcript of Proceedings of April 1, 1955

The above-entitled matter came on for hearing before the Honorable Gunnar H. Nordbye, Chief Judge of the above court, in the United States Court House in Minneapolis, Minnesota, on April 1, 1955.

APPEARANCES:

Kenneth J. Enkel, Esq., Metropolitan Building; Minneapolis, Minnesota, Attorney for Petitioner.

Mr. George E. MacKinnon, United States Attorney, and Mr. Clifford F. Janes, Assistant United States Attorney, St. Paul, Minnesota, appeared on behalf of Respondent.

[fol. 187] Mr. Enkel: At this time the petitioner moves to amend his petition for writ of habeas corpus by adding the further reason why the writ of habeas corpus should issue as provided by law. The additional reason is as follows:

“The evidence produced at the administrative hearings are insufficient to sustain the deportation order against the petitioner.”

Mr. Janes: I might state that the Government's position on that is that I noticed that in his motion the petitioner [fols. 188-195] referred to "administrative hearings," in the plural. I know of only one administrative hearing involved here. To make that amendment in that way a part of the petition I think is introducing matter that would not properly be before the Court.

The Court: I will deny the motion.

Mr. Enkel: I object on the ground if the Government will check their return they will find there are two separate hearings.

The Court: If you are now referring to the record as before the Court—

Mr. Enkel: I understand that I have no other alternative. If I have more I will certainly take it, but I understand I have been limited by the Court.

The Court: The Court will allow the amendment insofar as you challenge the sufficiency of the present record to sustain the order of deportation. To that extent the Court will allow the amendment.

[fol. 196] UNITED STATES DISTRICT COURT, DISTRICT OF
MINNESOTA, FOURTH DIVISION

No. 5108 Civil

[Title omitted]

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS—
May 18, 1955

The above matter came on for hearing before the Court on a petition for a writ of habeas corpus filed by the above-named petitioner returnable March 25, 1955.

Mr. Kenneth J. Enkel, Minneapolis, Minnesota, appeared in behalf of the petitioner;

and

Mr. George E. MacKinnon, United States Attorney, and Mr. Clifford Janes, Assistant United States Attorney, St. Paul, Minnesota, appeared in behalf of the respondent.

[fol. 197] At the hearing on the petition the matter was sub-

mitted on the affidavit in support of the petition and return made by the respondent. The petitioner stated in open court that he did not care to offer any oral testimony. Thereafter, and on March 30, 1955, the attorney for petitioner filed a notice of motion returnable April 1st for an order reopening the hearing before the Court and granting petitioner sufficient time before the reopened hearing to make an appropriate motion to obtain the production of documents as well as to submit a second supplemental petition for a writ of habeas corpus. At the hearing on the motion returnable April 1st, the Court permitted the petitioner to amend his original petition for a writ of habeas corpus by adding an additional reason for the issuance of the writ, to wit, "The evidence produced at the administrative hearings is insufficient to sustain the deportation order against the petitioner." The Court concluded that, by such amendment, petitioner was granted substantially the additional relief sought by the so-called supplemental petition. Otherwise, petitioner's motion was denied.

The return of respondent herein indicates that the petitioner at the time of the filing of the original petition was in custody and being deported pursuant to a warrant dated April 16, 1952, issued by Joseph A. Cushman, Acting District Director, Chicago District, Department of Justice, by authority of the Attorney General of the United States, pursuant to hearing and determination that the petitioner was and is an alien of a class required by law to be deported, to wit, a person who had been a member of the Communist Party since his last entry into the United States. The return indicated that petitioner had a full and complete hearing, after due notice, by a hearing officer, at which hearing and proceeding petitioner was at all times represented by counsel. The contention now made by petitioner that he has been denied certain constitutional rights has been set at rest by *Galvan v. Press*, 374 U.S. 522; *Harrisades v. Shaughnessy*, 342 U.S. 580. Moreover, petitioner's contention that the Act under which he is being deported constitutes a bill of attainder is without merit. The case of *Garner v. Los Angeles Board*, 341 U.S. 716, which petitioner cites and in which will be found an exposition of bills of attainder, sufficiently disposes of petitioner's contention in this regard. No purpose will be

served in discussing the other constitutional questions which have been so fully considered and disposed of contrary to petitioner's contention in *Galvan v. Press*, supra, and *Harisiades v. Shughnessy*, supra. Furthermore, the Court concludes that the evidence produced at the hearings in question amply sustains the deportation order in view of the language of the Supreme Court in *Galvan v. Press*, supra, at page 528,

"It must be concluded, therefore, that support, or even demonstrated knowledge, of the Communist Party's advocacy of violence was not intended to be a prerequisite to deportation. It is enough that the alien joined the Party, aware that he was joining an organization known as the Communist Party which operates as a distinct and active political organization, and that he did so of his own free will. A fair reading of the legislation requires that this scope be given to what Congress enacted in 1950, however severe the consequences and whatever view one may have of the wisdom of the means which Congress employed to meet its desired end."

Petitioner sets forth in his so-called supplemental petition for a writ of habeas corpus that he has made a motion to reopen his case before the Board of Immigration Appeals to enable him to make an application for suspension of deportation, pursuant to Section 244 of the Immigration and Nationality Act of 1952 (8 U.S.C.A. 1254). He requests this Court to stay the deportation order pending decision on his motion. However, this Court is not referred to any authority which authorizes it to grant a stay for such purpose. Moreover, it may be pointed out that over two years have elapsed since the enactment of Section 1254, 8 [fols. 199-209] U.S.C.A., and no steps heretofore have been taken by petitioner to accomplish a suspension of the order of deportation upon the grounds of hardship. The Court, therefore, would not be justified in granting any stay in addition to a reasonable time within which petitioner may prepare himself and put his affairs in order awaiting deportation.

It follows from the foregoing that petitioner's application for a writ of habeas corpus must be, and the same hereby is, denied, and the restraining order entered on the

order to show cause dated March 22, 1955, is vacated and discharged. It is so ordered.

A thirty-day stay of the deportation order is hereby entered.

An exception is reserved.

Dated this 18th day of May, 1955.

By the Court: Gunnar H. Nordbye, Chief Judge.

[File endorsement omitted]

[fol. 210] UNITED STATES COURT OF APPEALS FOR THE EIGHTH
CIRCUIT

No. 15,383

CHARLES ROWOLDT, Appellant,

vs.

J. D. PERFETTO, Acting Officer in Charge, Immigration and
Naturalization Service, Department of Justice, St. Paul,
Minnesota, Appellee

Appeal from the United States District Court for the
District of Minnesota.

OPINION—December 22, 1955

Kenneth J. Enkel for Appellant.

Clifford Janes, Assistant United States Attorney
(George E. MacKinnon, United States Attorney, was with
him on the brief), for Appellee.

Before Sanborn, Johnsen and Van Oosterhout, Circuit
Judges.

[fol. 211] SANBORN, Circuit Judge:

Counsel for Charles Rowoldt, an alien who was in custody
under a warrant for deportation issued April 16, 1952, by
the Acting District Director, Chicago District, Immigration
and Naturalization Service, Department of Justice, peti-
tioned the District Court for Rowoldt's release on habeas

corpus. The court issued an order to show cause directed to the respondent (appellee). After the filing of the respondent's return and after a hearing, the court denied the petition for a writ, and Rowoldt has appealed.

The deportation warrant followed proceedings conducted by the Immigration and Naturalization Service of the Department of Justice such as are customary in like cases. Rowoldt was accorded a hearing before a Hearing Officer on February 16, 1951, and March 28, 1951. He was represented by counsel of his own choosing. One of the charges against Rowoldt was that he was an alien who, after entry into the United States, was a member of the Communist Party of the United States, a charge which, if sustained, required his deportation, since Section 22 of the Internal Security Act of 1950, 64 Stat. 987, 1006, 1008, amending the Act of October 16, 1918, as amended, provides that the Attorney General shall take into custody and deport any alien "who was at the time of entering the United States, or has been at any time thereafter, * * * a member of any one of the classes of aliens enumerated in section 1 (2) of this Act * * *." (Page 1008.) Subparagraph (C) of section 1 (2) lists "Aliens who are members of or affiliated with (i) the Communist Party of the United States * * *."

(Page 1006.)

[fol. 212] Upon the evidence adduced before the Hearing Officer in the deportation proceedings, he, on May 15, 1951, found as facts: (1) That Rowoldt is an alien, a native and citizen of Germany; (2) that he last entered the United States in or about 1923 or 1924; and (3) that he was a member of the Communist Party of the United States in 1935.

The Hearing Officer concluded that Rowoldt was subject to deportation under the applicable statute, and should be deported. Rowoldt on May 21, 1951, filed exceptions to the decision and order of the Hearing Officer. On November 27, 1951, the proceedings before that Officer were reviewed in detail by the Assistant Commissioner, Adjudications Division of the Department of Justice Immigration and Naturalization Service, who ordered Rowoldt deported on the charge found by the Hearing Officer to have been sustained.

Rowoldt appealed to the Board of Immigration Appeals, Department of Justice, from the order of deportation of November 27, 1951. On March 28, 1952, the Board, after a hearing, dismissed the appeal, after stating: "The record sustains a finding that the respondent [Rowoldt] has been a member of the Communist Party." His deportation from the United States is mandatory."

Rowoldt makes two contentions: (1) that the evidence is insufficient to sustain the finding upon which the deportation order was based, namely, that he was a member of the Communist Party in 1935; and (2) that the District Court erred in denying his motion to reopen the case "for the purpose of enabling him to take proper steps to have all the proceedings of the Service before the Court." The [fol. 213] second contention is obviously without merit. The burden of demonstrating both error and prejudice is upon the appellant. There is nothing in the record to show that the introduction of any of the prior deportation proceedings involving Rowoldt would have been of any help to him or would or could have had any tendency to disprove the charge which resulted in the deportation order which is challenged.

The Hearing Officer, who found that in 1935 Rowoldt was a member of the Communist Party, had in evidence the sworn testimony voluntarily given by Rowoldt before a Special Inspector of the Immigration and Naturalization Service at Minneapolis, Minnesota, on January 10, 1947. Rowoldt at that time stated that in the spring or summer of 1935 he joined both the Workers' Alliance and the Communist Party in Minneapolis; that he held no office in the Communist Party, but was on the Executive Board of the Workers' Alliance; that he was a member of the Communist Party until the end of 1935, when he was arrested [in deportation proceedings]; that he was a member of the Party for probably about a year; that he ran the Party bookstore at 241 Marquette in Minneapolis for a while; that it dealt in literature of all kinds—Strachey, Marx, Lenin's writing and that of others, "Socialism and all that stuff"; that he was kind of a salesman, but the Communist Party ran the store; that it was an official outlet for Com-

munist literature; and that he secured his employment through his membership in the Communist Party.

Enough has been said, we think, to demonstrate that there was an adequate evidentiary basis for the finding [fol. 214] that Rowoldt was a member of the Communist Party in 1935; and that " * * * the record does not show a relationship to the Party so nominal as not to make him a 'member' within the terms of the Act." *Galvan v. Press*, 347 U.S. 522, 529. There is no controlling distinction between the *Galvan* case and *Rowoldt's* case.

The order appealed from is affirmed.

[fols. 215-216] UNITED STATES COURT OF APPEALS FOR THE
EIGHTH CIRCUIT

CHARLES ROWOLDT, Appellant,

vs.

J. D. PERFETTO, Acting Officer in Charge, Immigration and Naturalization Service, Department of Justice, St. Paul, Minnesota

Appeal from the United States District Court for the District of Minnesota.

JUDGMENT—December 22, 1955

This cause came on to be heard on the original files from the United States District Court for the District of Minnesota, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the order of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

December 22, 1955.

[fol. 217] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 218] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 26, 1956

The petition herein for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(8913-6)

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HAROLD S. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1957

No. ~~6783~~ 3

CHARLES ROWOLDT, *Petitioner,*

v.

J. D. PERFETTO, Acting Officer in Charge, Immigration
and Naturalization Service, Department of Justice,
St. Paul, Minnesota.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

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Attorneys for Petitioner.

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IN THE
Supreme Court of the United States

October Term, 1955

No.

CHARLES ROWOLBT, *Petitioner*,

v.

J. D. PERFETTO, Acting Officer in Charge, Immigration
and Naturalization Service, Department of Justice,
St. Paul, Minnesota.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

Petitioner prays for a writ of certiorari to review
a judgment of the United States Court of Appeals for
the Eighth Circuit which affirmed a judgment of the
United States District Court for the District of Min-
nesota denying a petition for a writ of habeas corpus.

OPINION BELOW

The opinion of the court below has not yet been
officially reported. A copy of the opinion and judg-
ment is hereto annexed as Appendix A.

JURISDICTION

1. The judgment of the Court of Appeals was issued on December 22, 1955. The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. section 1254(1).

QUESTIONS PRESENTED

1. Whether the petitioner had been a member of the Communist Party as that term was defined by this Court in *Galvan v. Press*, 347 U.S. 522, or whether he had been only a nominal member and therefore not subject to deportation.

2. Whether, notwithstanding *Galvan*, the statute providing for deportation of aliens for past membership in the Communist Party is unconstitutional on its face or as applied to the facts in this case.

STATUTE INVOLVED

Section 22 of the Internal Security Act of 1950, 64 Stat. 1006, 1008, provides in part as follows:

"That any alien who is a member of any one of the following classes shall be excluded from admission into the United States.

* * * * *

(2) Aliens who, at any time, shall be or shall have been members of any of the following classes:

* * * * *

(C) Aliens who are members of or affiliated with
(i) the Communist Party of the United States . . .

Section 4 of the aforesaid Section 22 provides in part:

- (a) Any alien who was at the time of entering the United States, or has been at any time thereafter, . . . a member of any one of the classes of aliens enumerated in section 1(2) of this Act, shall upon the warrant of the Attorney General, be taken into custody and deported in the manner provided in the Immigration Act of February 5, 1917. The provisions of this section shall be applicable to the classes of aliens mentioned in this Act, irrespective of the time of their entry into the United States."

This statute was carried forward by Section 241(a)(6)(C), of the Immigration and Nationality Act of 1952, 8 U. S. Code, section 1251 (a)(6)(C), providing:

"Any alien in the United States . . . shall upon the order of the Attorney General, be deported who . . . is or at any time has been, after entry a member of the following classes of aliens: . . . Aliens who are members of . . . the Communist Party of the United States."

STATEMENT OF THE CASE

The petitioner is an alien and a native of Germany. He is 72 years of age. He was admitted to the United States for permanent residence in 1914, and has been a resident of the United States for over 40 years (R. 22). In 1935 the petitioner joined the Communist Party and remained a member for about six months (R. 22). He was ordered deported under the provisions of Section 22 of the Internal Security Act of 1950, *supra*, on the basis of his past membership in the Communist Party (R. 22-23).

The order of deportation was based entirely on the voluntary statement which the petitioner made to an officer of the Immigration Service (R. 103-110). In this statement the petitioner stated his purpose in joining the Communist Party as follows:

"It seemed to me that it came hand in hand—the Communist Party and the fight for bread. It seemed to me like this—let's put it this way—that the Communist Party and the Workers Alliance had one aim—to get something to eat for the people." (R. 105).

* * * * *

Q. Again referring to your joining the Communist Party in 1935, was this motivated by dissatisfaction in living under a democracy?

A. No, not by that. Just a matter of having no jobs at that time. Everybody around me had the idea that we had to fight for something to eat and clothes and shelter. We were not thinking then—anyways the fellows around me, of overthrowing anything. We wanted something to eat and something to crawl into.

Q. You say 'fight for something to eat and crawl into.' What do you mean by that term?

A. We had to go and ask those who had it—that was the courthouse at that time. We petitioned city, state and national government. We did and we succeeded. We finally got unemployment laws and a certain budget. Even at the few communist meetings I attended, nothing was ever said about overthrowing anything. All they talked about was fighting for the daily needs. That is why we never thought much of joining those parties in those days." (R. 108-109.)

Petitioner filed a petition for a writ of habeas corpus in the United States District Court for the District of

Minnesota challenging the validity of this deportation order (R. 3-5). The District Court denied the petition for a writ holding that the deportation order was supported by the evidence. (R. 196-199). On appeal the Court of Appeals affirmed. (Appendix A):

REASONS FOR GRANTING THE WRIT

1. In *Galvan v. Press*, 347 U.S. 522, this Court upheld the constitutionality of the provision of the Internal Security Act of 1950 which provided for the deportation of aliens who at one time had been members of the Communist Party. The Court, however, in the course of its opinion held that the Act did not apply to every past member of the Communist Party. The Court said, at page 527:

“Congress could not have intended to authorize the wholesale deportation of aliens who accidentally, artificially, or unconsciously in appearance only, are found to be members of or affiliated with an organization of whose platform and purposes they have no real knowledge.”

The Court also referred (at 527) to the fact that in 1951 Congress specifically declared that it did not intend the term ‘member’ to cover aliens who ‘had joined a proscribed organization (1) when they were children, (2) by operation of law, or (3) to obtain the necessities of life.’”

This Court held that an alien comes within the terms of the statute even if he does not have knowledge of the Communist Party’s claimed advocacy of violence. The Court added (at 528), “It is enough that the alien joined the Party, aware that he was joining an organization known as the Communist Party which operates

as a distinct and active political organization, and that he did so of his own free will." The Court concluded (at 529) that so far as the alien in that case was concerned, "The record does not show a relationship to the Party so nominal as not to make him a 'member' within the terms of the Act."

This case presents the important question as to what is a "nominal member" under the qualification made in *Galvan*.

The *Galvan* case was decided by this Court on May 24, 1954. Two weeks later this Court granted certiorari in the case of *Garcia v. Landon*, 347 U.S. 1011. The *Garcia* case, like *Galvan*, posed principally a challenge to the constitutionality of Section 22 of the Internal Security Act of 1950. In view of this Court's decision in *Galvan*, sustaining the constitutionality of the statute, the only question which remained open in the *Garcia* case was whether Garcia was a "member" of the Communist Party as that term had been defined in *Galvan*. Garcia, like the petitioner here, had joined the Communist Party as a result of his activities and associations in the Workers Alliance of America. He remained a member of the Communist Party for a considerably longer period than the petitioner here since he continued his membership for about two years. His objectives and purposes in joining the Communist Party were identical with that of the petitioner in that as a result of his activities in the Workers Alliance, he, like the petitioner, felt that his membership in the Party would assist him in gaining employment and relief.

In October, 1954, the government filed a suggestion of mootness in *Garcia*. In this suggestion, the govern-

ment stated that in view of the language of this Court in *Galvan*, it had set aside the deportation order so as to permit an administrative determination of whether Garcia was only a "nominal member" of the Communist Party as that term had been defined in *Galvan*.¹ This Court, on the basis of the suggestion filed by the government, dismissed the writ in the *Garcia* case as moot, 348 U.S. 666.

The petitioner's case is indistinguishable from Garcia's. His relationship with the Communist Party was, if anything, less than Garcia's. He was not active in the Communist Party. He joined because of his activities in the Workers Alliance and because of his belief that membership in the Communist Party would assist him and others in gaining employment, relief, and legislation for the unemployed. As the petitioner stated:

"We wanted something to eat and something to crawl into . . . All they [those present at Communist meetings] talked about was fighting for the daily needs. That is why we never thought much of joining those parties in those days."

Like the decision in *Garcia*, the decision of the Immigration Service in the petitioner's case was handed down prior to the decision of this Court in *Galvan*. Accordingly, the Service has at no time considered the applicability of the language of this Court in *Galvan* to the facts in petitioner's case. Thus the petitioner's case presents to this Court an opportunity to consider and decide the issue which it deemed im-

¹ The government also indicated that it would consider whether to grant suspension of deportation.

portant in *Garcia* and on which it there granted certioria. The issue is an important one in the continuing administration of Section 22 of the Internal Security Act of 1950, and the identical provision as carried forward by Section 241 (a)(6)(C) of the Immigration and Nationality Act of 1952, 8 U.S. Code section 1251(a)(6)(C).

There are many cases presently pending in the lower courts challenging the validity of deportation orders under these statutes and raising the question as to whether the evidence establishes that the alien was formerly a member of the Communist Party or whether his membership was only "nominal" as that term was defined in *Galvan*. Counsel for the petitioner themselves have eleven such cases at various stages pending in the United States District Court for the District of Columbia and the Court of Appeals for the District of Columbia Circuit. Many other such cases are pending in other District Courts throughout the country and undoubtedly still others are either pending before or have been decided by the Immigration Service without a court challenge.

Some of these cases were decided prior to this Court's decision in *Galvan* and some subsequent thereto. In the experience of counsel, the Immigration Service has decided these cases and the lower courts have upheld its decisions without reference to or consideration of this Court's qualifying language in *Galvan*. Two such cases may be taken as typical of the type of evidence upon which deportation orders were entered.

In *Ramirez-Salse v. Brownell*, No. 12,852, pending in the United States Court of Appeals for the District of Columbia Circuit, a deportation order was entered

solely upon evidence of an undated card bearing the alien's signature and acknowledging receipt of a "membership book" but nowhere on its face indicating any application to the Communist Party, and not the subject of testimony explaining its source, plus the testimony of a former member of the Communist Party that the card corresponded to a form used by the Communist Party in 1938. There was no evidence as to the circumstances under which the alien had signed the card, and no evidence that the alien had ever applied for membership in the Communist Party, had ever attended meetings of the Communist Party, had ever paid dues to the Communist Party, or had ever participated in any way in any activities connected with the Communist Party. The Immigration Service, nevertheless held that the alien came within the provisions of the statute and must be deported and the District Court upheld the order of deportation.

In *Grondahl v. Brownell*, Civil Action No. 2513-54, in the United States District Court for the District of Columbia, notice of appeal in which has been filed, an order of deportation was based upon the testimony of a witness that in 1938 he had seen the alien "several times around the Industrial Section headquarters of the Communist Party," and that also in 1938 another official of the Party had told the witness, not in the presence of the alien, that the alien was a member of the Party. Here too, there was no evidence that the alien had ever joined the Communist Party, had ever attended a meeting or paid dues to the Party, or had ever participated in any way in any activities connected with the Party.

Under the circumstances, an early decision by this Court applying the *Galvan* qualification and indicating more specifically when an alien must be held to have been merely a nominal member of the Communist Party is essential for the proper administration of the Act and will avoid protracted litigation.

2. The petitioner in this case is being deported solely on the ground that he was a member of the Communist Party for six months in 1935, on a record which shows that his sole interest in the Communist Party was as an organization which would assist him in obtaining unemployment relief. The petitioner has been a resident of this country for over forty years. His contact with the Communist Party was a brief one and more than twenty years old and antedated the statute by fifteen. His motivation was economic necessity. We believe that *Galvan* was wrongly decided and should be overruled. In any event, we believe that the application of that decision to facts such as the present are so fundamentally unfair and so devoid of a legitimate governmental purpose as to warrant determination by the Court as to whether the statute sustained in *Galvan* can reach so far as to be constitutionally applied on the facts in this case.

Respectfully submitted.

DAVID REIN

JOSEPH FORER

Forer & Rein

711 14th St., N. W.

Washington, D. C.

Attorneys for Petitioner.

OpinionUNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 15,383

CHARLES ROWOLDT, *Appellant*,

v.

J. D. PERFETTO, Acting Officer in Charge, Immigration and
Naturalization Service Department of Justice, St. Paul,
Minnesota, *Appellee*.Appeal from the United States District Court
for the District of Minnesota.

(December 22, 1955)

Kenneth J. Enkel for Appellant.

Clifford Janes, Assistant United States Attorney (George
E. MacKinnon, United States Attorney, was with him
on the brief,) for Appellee.Before SANBORN, JOHNSEN and VAN OOSTERHOUT, Circuit
Judges.

SANBORN, Circuit Judge.

Counsel for Charles Rowoldt, an alien who was in custody under a warrant for deportation issued April 16, 1952, by the Acting District Director, Chicago District, Immigration and Naturalization Service, Department of Justice, petitioned the District Court for Rowoldt's release on

habeas corpus. The court issued an order to show cause directed to the respondent (appellee). After the filing of the respondent's return and after a hearing, the court denied the petition for a writ, and Rowoldt has appealed.

The deportation warrant followed proceedings conducted by the Immigration and Naturalization Service of the Department of Justice such as are customary in like cases. Rowoldt was accorded a hearing before a Hearing Officer on February 16, 1951, and March 28, 1951. He was represented by counsel of his own choosing. One of the charges against Rowoldt was that he was an alien who, after entry into the United States, was a member of the Communist Party of the United States, a charge which, if sustained, required his deportation, since Section 22 of the Internal Security Act of 1950, 64 Stat. 987, 1006, 1008, amending the Act of October 16, 1918, as amended, provides that the Attorney General shall take into custody and deport any alien "who was at the time of entering the United States, or has been at any time thereafter, * * * a member of any one of the classes of aliens enumerated in section 1 (2) of this Act * * *." (Page 1008). Subparagraph (C) of section 1 (2) lists "Aliens who are members of or affiliated with (i) the Communist Party of the United States * * *." (Page 1006).

Upon the evidence adduced before the Hearing Officer in the deportation proceedings, he, on May 15, 1951, found as facts: (1) That Rowoldt is an alien, a native and citizen of Germany; (2) that he last entered the United States in or about 1923 or 1924; and (3) that he was a member of the Communist Party of the United States in 1935.

The Hearing Officer concluded that Rowoldt was subject to deportation under the applicable statute, and should be deported. Rowoldt on May 21, 1951, filed exceptions to the decision and order of the Hearing Officer. On November 27, 1951, the proceedings before that Officer were reviewed in detail by the Assistant Commissioner, Adjudi-

cations Division of the Department of Justice Immigration and Naturalization Service, who ordered Rowoldt deported on the Charge found by the Hearing Officer to have been sustained.

Rowoldt appealed to the Board of Immigration Appeals, Department of Justice, from the order of deportation of November 27, 1951. On March 28, 1952, the Board, after a hearing, dismissed the appeal, after stating: "The record sustains a finding that the respondent (Rowoldt) has been a member of the Communist Party. His deportation from the United States is mandatory."

Rowoldt makes two contentions: (1) that the evidence is insufficient to sustain the finding upon which the deportation order was based, namely, that he was a member of the Communist Party in 1935; and (2) that the District Court erred in denying his motion to reopen the case "for the purpose of enabling him to take proper steps to have all the proceedings of the Service before the Court." The second contention is obviously without merit. The burden of demonstrating both error and prejudice is upon the appellant. There is nothing in the record to show that the introduction of any of the prior deportation proceedings involving Rowoldt would have been of any help to him or would or could have had any tendency to disprove the charge which resulted in the deportation order which is challenged.

The Hearing Officer, who found that in 1935 Rowoldt was a member of the Communist Party, had in evidence the sworn testimony voluntarily given by Rowoldt before a Special Inspector of the Immigration and Naturalization Service at Minneapolis, Minnesota, on January 10, 1947. Rowoldt at that time stated that in the spring or summer of 1935 he joined both the Workers' Alliance and the Communist Party in Minneapolis; that he held no office in the Communist Party, but was on the Executive Board of the Workers' Alliance; that he was a member

of the Communist Party until the end of 1935, when he was arrested (in deportation proceedings); that he was a member of the Party for probably about a year; that he ran the Party bookstore at 241 Marquette in Minneapolis for a while; that it dealt in literature of all kinds—Strachey, Marx, Lenin's writing and that of others, "Socialism and all that stuff"; that he was kind of a salesman, but the Communist Party ran the store; that it was an official outlet for Communist literature; and that he secured his employment through his membership in the Communist Party.

Enough has been said, we think, to demonstrate that there was an adequate evidentiary basis for the finding that Rowoldt was a member of the Communist Party in 1935; and that " * * * the record does not show a relationship to the party so nominal as not to make him a 'member' within the terms of the Act." *Galvan v. Press*, 347 U.S. 522, 529. There is no controlling distinction between the *Galvan* case and *Rowoldt's* case.

The order appealed from is affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

Judgment

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1955.

No. 15,383

CHARLES ROWOLDT, *Appellant*,

v.

J. D. PERFETTO, Acting Officer in Charge, Immigration and
Naturalization Service, Department of Justice, St. Paul,
Minnesota.

Appeal from the United States District Court for the
District of Minnesota.

This Cause came on to be heard on the original files from
the United States District Court for the District of Min-
nesota, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and
Adjudged by this Court that the Order of the said District
Court appealed from in this cause be, and the same is
hereby, affirmed.

December 22, 1955.

Office - Supreme Court, U.S.

FILED

SEP 7 1956

JOHN T. FEY, Clerk

IN THE
Supreme Court of the United States

OCTOBER TERM, 1956

No. ~~24~~ 5

CHARLES ROWOLDT, *Petitioner*,

v.

J. D. PERFETTO, ACTING OFFICER IN CHARGE,
IMMIGRATION AND NATURALIZATION SERVICE,
DEPARTMENT OF JUSTICE, ST. PAUL, MINNESOTA

On Writ of Certiorari to the United States Court of Appeals
for the Eighth Circuit

BRIEF FOR PETITIONER

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1956

No. 34

CHARLES ROWOLDT, *Petitioner*,

v.

J. D. PERFETTO, ACTING OFFICER IN CHARGE,
IMMIGRATION AND NATURALIZATION SERVICE,
DEPARTMENT OF JUSTICE, ST. PAUL, MINNESOTA

On Writ of Certiorari to the United States Court of Appeals
for the Eighth Circuit

BRIEF FOR PETITIONER

OPINIONS BELOW .

The opinion of the Court of Appeals (R. 38-41) is reported at 228 F. 2d 109. The opinion of the District Court (R. 35-8) has not been reported.

JURISDICTION

The jurisdiction of the Court rests on 28 U. S. Code, Sec. 1254(1). The petition for a writ of certiorari was granted on March 26, 1956 (R. 42).

STATUTE INVOLVED

Section 22 of the Internal Security Act of 1950, 64 Stat. 1006, 1008, amended section 4 of the Immigration Act of 1918, to provide in part as follows:

"That any alien who is a member of any one of the following classes shall be excluded from admission into the United States:

* * * * *

(2) Aliens who, at any time, shall be or shall have been members of the following classes:

* * * * *

"(C) Aliens who are members of or affiliated with (i) the Communist Party of the United States, (ii) any other totalitarian party of the United States, (iii) the Communist Political Association, (iv) the Communist or other totalitarian party of any State of the United States, or of any foreign state, or of any political or geographical subdivision of any foreign state; (v) any section, subsidiary, branch, affiliate, or subdivision of any such association or party; or (vi) the direct predecessors or successors of any such association or party, regardless of what name such group or organization may have used, may now bear, or may hereafter adopt . . ."

The aforesaid Section 22 amended section 4 of the Immigration Act of 1918 to provide in part:

"(a) Any alien who was at the time of entering the United States, or has been at any time thereafter, . . . a member of any one of the classes of

aliens enumerated in section 1 (2) of this Act, shall upon the warrant of the Attorney General, be taken into custody and deported in the manner provided in the Immigration Act of February 5, 1917. The provisions of this section shall be applicable to the classes of aliens mentioned in this Act, irrespective of the time of their entry into the United States.¹

QUESTIONS PRESENTED

1. Whether the petitioner had been a member of the Communist Party as that term was defined by this Court in *Galvan v. Press*, 347 U. S. 522; or whether he had been only a nominal member and therefore not subject to deportation.

2. Whether, notwithstanding *Galvan*, the statute providing for deportation of aliens for past membership in the Communist Party is unconstitutional on its face or as applied to the facts in this case.

STATEMENT OF THE CASE

The petitioner is an alien, a native of Germany. He is 72 years of age. He was admitted to the United States for permanent residence in 1914, and has lived in this country ever since. He has been refused American citizenship (R. 9).

Petitioner was ordered deported under Section 22 of the Internal Security Act of 1950, *supra*, on a finding that he had been a member of the Communist Party for about six months in 1935 (R. 9-11, 12). The de-

¹ These provisions were repealed by Section 403(a)(16) of the Immigration and Nationality Act of June 27, 1952, 166 Stat. 163, 279. The 1952 Act recodified and reenacted these provisions without material change. See Section 241(a)(6)(c), 66 Stat. 204, 8 U.S.C. 1251(a)(6)(c).

cision of the Board of Immigration Appeals affirming the order of deportation was handed down on March 28, 1952 (R. 9), more than two years before this Court's decision in *Galvan v. Press*, 347 U. S. 522.

The finding of Party membership was based upon a voluntary statement which the petitioner made under oath to an officer of the Immigration Service on January 10, 1947 (R. 12, 20-33). The portions of that statement which bear upon the issues in this case are as follows: (R. 25-32):

"Q. Have you ever been arrested or in jail for any crime or offense anywhere? A. No, except the time in 1935 I was arrested in deportation proceedings.

Q. Are you a member of any organizations or societies of any kind at the present time? A. Yes, I belong to the A. F. L. Local No. 665, Miscellaneous Hotel & Restaurant Workers.

Q. To what organizations have you belonged in the past? A. In the past, the Worker's Alliance, the Communist Party.

Q. When did you join the Workers' Alliance? A. In the spring or summer of 1935, I joined both the Workers' Alliance and the Communist Party.

Q. Where did you join these organizations? A. In Minneapolis.

Q. Did you hold any office in either of these organizations? A. Not in the Communist Party but in the Workers' Alliance, I was on the Executive Board, and once in a while I was secretary for some local.

Q. What—the purpose of your joining the Communist Party at that time? A. We had no books then, just paid dues, and somebody collected.

Q. Did you carry a party dues book at that time? A. No, but in the Workers' Alliance we had dues books.

Q. Did you carry a Communist Party card at that time? A. I don't think we had cards at all.

Q. For how long were you a member of the Communist Party? A. From then on until I got arrested and that was at the end of 1935. When I was arrested, I finished the Communist Party membership, but I stayed in the Workers' Alliance.

Q. How long did you continue your membership in the Workers' Alliance? A. Probably a couple of years longer—then it dissolved itself.

Q. What—the purpose of your joining the Communist Party? A. The Purpose was probably, this—it seemed to me that it came hand in hand—the Communist Party and the fight for bread. It seemed to me like this—let's put it this way—that the Communist Party and the Workers' Alliance had one aim—to get something to eat for the people. I didn't know it was against the law for aliens to join the Communist Party and the Workers' Alliance. I found that out when Mr. Adams told me.

Q. What were your political beliefs at the time you joined the Communist Party? A. My political beliefs were always somewhat for the benefit of most of the people—always for the benefit to help most of the people.

Q. Apparently you were a member of the Communist Party for approximately one year. Is that correct? A. Yes, probably something like that.

Q. What is your present attitude towards Communism? How do you feel about that? A. I explained that a couple of years ago to those people over there (indicates Mr. C. A. Frederickson). I believe today, and this is my honest opinion, I believe today that Communism and Capitalism, as we call it, will come together in spite of all the world war threats, and even preparations—to solve their problems, thus a better world without a third world war. That is my opinion today.

and that much hope I have in the statesmen of the world today. That is the best way I can put that. That is my honest belief.

Q. What is your belief and understanding of the principles of communism? A. If you read Marx or any of the writers of Lenin and Stalin, you will find this—that out of a world of struggle between two classes will emerge finally—first it will be a dictatorship, totalitarian, which, as time goes by, will wither and regulate the economics of the world for the benefit of all people, which were formerly rich or poor.

Q. Is it your opinion that before communism and a capitalistic form of government will be able to exist in the same world, that a dictatorship must necessarily evolve from a capitalistic form of government? A. I answered that before. I said that Hitler was such a dictatorship of capitalism, that is what he didn't want. Now Hitler is overthrown and the main obstacle of the progressive form of march in the world has been more secured, I don't think it is necessary that a capitalistic dictatorship has to come because progressive forces in the capitalistic countries of today will eventually be able to cooperate with the communistic forces, and settle in more or less a peaceful manner, the business of the world. That is my honest opinion. Men come and go, and the people always stay. The people finally, in the last analysis, want peace and security. They will find a representative who will take care of that.

Q. Let me ask you this. What is your opinion as to the form of government which today we have in the United States? A. As far as I have found in the world, the American system of government, as far as the capitalistic system is concerned and even the communistic, is still the best in the whole world, including the communistic system, because there is not a good one yet.

Q. Are you of the opinion that our form of gov-

ernment is perfect? A. No, of course not, but we have a Constitution which is almost perfect, and by that measurement, we can make it perfect.

Q. Do you think that the Constitution under which we reside in the United States should be changed in any way, other than by the vote of the people? A. No, the Constitution should not be changed by just a man or two. The people of the United States should have the say in that.

Q. Do you have any opinion as to whether or not this country is headed for a change in the form of government? A. I can't have no opinion on that. For the time being there is no such thing.

Q. Do you have an opinion as to whether or not a form of government should be changed in any way other than by the will of the people? A. A form of government should not be changed in any way except by the will of the great majority of the people. I think President Lincoln said that.

Q. If a minority people of a government desire a change in the form of their government, do you think it would be wise and advisable to resort to force? A. No, that would not be wise or advisable. No, a minority should not go against the majority by forcing violence.

Q. Do you think it would be the right of a majority of people residing under a government to overthrow the government by force? A. No, not by force either. They should be able to do it peacefully, not by force.

Q. Were you an active worker in the Communist Party? A. The only active work I did was running the bookstore for a while.

Q. Where did you run a bookstore? A. 241 Marquette, Minneapolis.

Q. What sort of bookstore was it? A. Oh, all kinds of literature—all kinds of writers in the whole world—Strachey, Marx, Lenin's writing and others. Socialism and all that stuff.

Q. Did you own the bookstore? A. No, I didn't get a penny there.

Q. What was the arrangement there? A. I was kind of a salesman in there, but the Communist Party ran it.

Q. You secured this employment through your membership in the Communist Party? A. Yes.

Q. Was this store an official outlet for communist literature? A. Yes.

Q. What is your opinion of a revolution, such as occurred in Russia when the Communists obtained power? A. What is my opinion of the Russian revolution—that is about it. As much as I know about it, the Russian revolution, in my opinion, is this. It seemed that at the end of the war of 1914, the Russian middle-class especially and the Russian soldiers were sick and tired of being doubled-crossed and betrayed by their generals and what not (they went in with the Germans). Russian soldiers spilled their blood running against the Germans without ammunition, and there was chaos in the country. I said middle-class—that they organized and succeeded in overthrowing that particular leadership which was headed by the Czar. But this is my opinion. This was under the leadership of Kerensky. Seemingly, Lenin and his followers which represented more the lower peasant and factory workers, were not satisfied with this set-up, and kept on working for another revolution which finally overthrew the whole upper class in the fall of 1918, and so divorced themselves for the first time in world's history, economically and politically, from the rest of the world. That is the way I see it. That is my opinion on that.

Q. Do you advocate change of government by force or violence? A. No, never did.

Q. Do you feel that the present government of the United States will ever be overthrown by force or violence? A. On account of our Constitution and the very intelligent American people, we don't have to do that.

Q. Do you have any opinion as to whether or not it will ever occur? A. It could because after all, nobody can see into the future, but I don't believe it could.

Q. At the present time, are you in sympathy with the principles of communism? A. Communism doesn't tell me anything. Communism nor capitalism don't tell me anything. I am a progressive, and I want to see a better world. If I don't see it in this life, because I believe in reincarnation, I hope to see it when I come back—where all people can get to the resources of this life—that means education and life as we should have it. I like some of the sayings of Jesus. He said that he wanted that all people should be helped. Principles of communism and capitalism doesn't mean anything to me. They have too many points—first, dictatorship, hit the other fellow down.

Q. Do you feel that communism is a better or poorer form of government than a democracy? A. The communist government, as we know it now, is not better than a capitalistic government as we know it. It is not better.

Q. Do you feel that communism can ever replace and be a better form of government than a democracy? A. That is a question to which it is hard to answer because we cannot see into the future. The only way that I could answer that is—the trend in the world today seems to be to some sort of change, like socialism or communism, and if that trend should continue to engulf the whole world, it would be up to the people to make whatever develops out of it—a real government for themselves, which would be better than what capitalism today gives them.

Q. Do you believe, without reservation, in the form of government we have in the United States today? A. Yes, I believe, without reservation, in the form of government we have in the United States today. It is good enough for me.

Q. Do you feel that your beliefs in government have changed during the past ten years, that is, since you terminated membership in the Communist Party? A. Yes, it has changed to that extent—that I began thinking for myself instead of following somebody else telling me things. I found that nothing can be broken over a knee, and that any government that exists today as a right to exist as it is—by the power of the majority of a nation's people. Nobody in the world can say there are no changes. We must always consider changes. They can be made when the people see that it is the right time for it, and at that time they will have their representatives which will take care of it. I am absolutely against sudden dictatorship and overthrow of government.

Q. Again referring to your joining the Communist Party in 1935, was this motivated by dissatisfaction in living under a democracy? A. No, not by that. Just a matter of having no jobs at that time. Everybody around me had the idea that we had to fight for something to eat and clothes and shelter. We were not thinking then—anyways the fellows around me, of overthrowing anything. We wanted something to eat and something to crawl into.

Q. You say 'fight for something to eat and crawl into'. What do you mean by that term? A. We had to go and ask those who had it—that was the courthouse at that time. We petitioned city, state and national government. We did and we succeeded. We finally got unemployment laws and a certain budget. Even at the few communist meetings I attended, nothing was ever said about overthrowing anything. All they talked about was fighting for the daily needs. That is why we never thought much of joining those parties in those days.

Q. What is your opinion as to whether communism was the cause or outgrowth of the Russian

revolution? A. Communism did not start the revolution. The middle-class started the revolution. Lenin got hold of it. Communism was the result of the revolution.

Q. Were you an organizer for the Communist Party? A. No.

Q. What is your personal belief as to the principles of communism? A. What is communism? That is a good question. My belief is a different thing than communism is. According to Marx and Lenin and as I have seen the Communists working, since I knew of them, they are aiming, more or less, with forever methods to set up an economic system to get the people out of a monopoly control on to their own economic feet. That is the way I see them working now."

Petitioner filed a petition for a writ of habeas corpus in the United States District Court for the District of Minnesota challenging the validity of the deportation order (R. 1-3, 34-35). The District Court denied the petition for a writ, holding that the deportation order was supported by the evidence (R. 35-38). The Court of Appeals affirmed (R. 41).

SUMMARY OF ARGUMENT

I

A. Galvan v. Press, 347 U.S. 522, construed the statute requiring the deportation of aliens who had ever been members of the Communist Party as not applying to persons who had been only "nominal members." This term includes, but is not limited to, persons who joined the Party to "obtain the necessities of life," who had "no real knowledge" of its platform and purposes," or who were not aware that they were "joining an organization known as the Com-

7
 munist Party which operates as a distinct and active political organization." Since the government has the burden of proving deportability, its evidence must exclude these and other situations of nominal membership by showing that the alien had engaged in such activity as to take him out of the nominal class.

B. The petitioner was merely a nominal member since he belonged to the Party for only about six months and was not active in it. Furthermore, he falls within specific classes of members expressly described as nominal in *Galvan*, having joined the Party "to obtain the necessities of life;" having been unaware that the organization operated "as a distinct and active political organization," and having had "no real knowledge" of its "platform and purposes."

C. At a minimum the case should be returned to the Immigration and Naturalization Service to determine whether petitioner was a nominal member. The Service decided the case two years before *Galvan* and did not take into account that decision's limitation on deportable membership. The administrative decision, therefore, must be set aside for the failure to make a finding on proper premises, even if the evidence would have supported such a finding if it had been made.

II.

A. The Court should reconsider its holding in *Galvan v. Press* that the statute is constitutional. *Galvan* holds that the expulsion power is not limited by substantive due process. This rule is of great significance to the alien community and to our society as a whole. *Galvan* also recognized that on principle

the statute is of dubious validity. Nevertheless, it sustained the statute solely on the assumption that the issues had been settled by prior decisions. This was an abnegation of the judicial function, and one which was based on an erroneous premise.

B. *Galvan* misreads history. It relies on generalizations from earlier cases that the deportation power is unlimited and that deportation is not punishment, meantime ignoring generalizations to the contrary in other cases. The generalizations relied on by *Galvan* derive from decisions which dealt with non-comparable subjects, namely, exclusion legislation, expulsion legislation ancillary to exclusion, or legislation which reasonably defined in terms of culpable characteristics classes of aliens who were undesirable residents when ordered expelled. This appears from a review of preceding cases.

Harisiades v. Shaughnessy, 342 U.S. 580, was the first case in this Court to sustain expulsion for conduct after lawful admission, which was not culpable when it occurred, and which had happened many years before the enactment of the legislation. It was also the first case to hold valid legislation expelling aliens for organizational membership. *Galvan* goes beyond *Harisiades*, which itself was wrongly decided, since it involves all the questionable features of *Harisiades* and in addition sustains a statute expelling aliens for membership in a named organization.

III.

A. Once the statute is examined on the basis of constitutional principle, there can be no doubt that it violates the due process clause. *Galvan* virtually

recognized as much. The most striking of the statute's features which violate due process is that it is special legislation. This act is the first and so far the only statute which expels aliens for membership in a specifically named organization, rather than by a descriptive classification of persons or organizations. On principle, the situation is the same as if Congress had listed the names of the aliens to be deported.

The statute's condemnation by legislative fiat is fundamentally repugnant to due process, whose basic concepts are that guilt cannot be legislated and that individuals and organizations cannot be condemned without a hearing. The government defends the statute on the ground that it is a reasonable legislative judgment, based on evidence considered by Congress, that the Communist Party is a pernicious organization. Due process, however, prohibits condemnation by legislative fiat even if there is reason to believe that the victim is getting what he deserves. Due process requires not simply that condemnation be reasonable or deserved, but that it be made by a civilized and fair method.

B. The statute is invalid as an irrational deprivation of liberty. The sole justification of the expulsion power is that it enables the state to remove from its territory undesirable alien residents. The statute violates due process because it is so capricious an exercise of the expulsion power as to shock the conscience, and because it imposes a cruel sanction for reasons having no rational relation to the expulsion function.

The statute expels an alien solely because of organizational membership. This imputation of guilt by

association is an offensively irrational means of adjudging an alien an undesirable resident. The irrationality is magnified by the fact that the statute makes no accommodation for the nature of the alien's connection with the organization. He may have had no knowledge of the claimed evil nature of the organization; his activities in the organization may have been innocuous, commendable, or limited to the exercise of constitutional rights; his membership may have been for a brief period; it may have existed long before the expulsion and long before the legislation making it cause for expulsion and may have been as remote as 1919, when the Communist Party was formed; the alien may never have had Communist beliefs, or, if he did, may have long ago abandoned them.

The present case fully illustrates the cruel irrationality of the statute. There is no rational basis for a judgment that the petitioner is an undesirable resident because about twenty years ago, in a different political climate and before enactment of the deportation statute, he belonged to the Communist Party for six months, having joined it to struggle by peaceable means for bread and shelter for the unemployed. Nor is petitioner's case atypical. A survey of political expulsion cases documents the inhumanity and lack of legitimate purpose of the policy of expelling persons on the ground of past Communist Party membership.

The government's contention that Congress could reasonably believe that the Communist Party advocates doctrines of violence is beside the point. The government is deporting petitioner, not the Communist Party or insurrectionary doctrine. Moreover,

the government's contention is inaccurate. The statute applies to the Party in the future, as well as in the past, and Congress could not make a reasonable determination of the Party's future advocacy. Furthermore, the statute expels for membership in the Communist Party during World War II, when there could be no basis for a claim that the Party was advocating insurrectionary doctrine, and it also expels for membership in the Communist Political Association, which the government has conceded did not advocate violent overthrow.

Nor can the statute be justified by necessity. Other expulsion legislation suffices to remove aliens who actually are undesirable.

C. There is nothing special about the expulsion power which warrants a disregard of the due process defects of the statute. *Harisiades* held otherwise on two premises: (1) The alien has no "vested right" to retain his residence and (2) the policy toward aliens is interwoven with the conduct of foreign relations and the war power. Both premises are unsound. Due process prohibits an irrational and discriminatory deprivation of a privilege, as well as of a "vested right," as for example, in the case of the privilege of government employment. And as *Galvan* itself pointed out, substantive due process is a limitation upon all powers of Congress even the war power.

Any connection between the conduct of foreign relations and the expulsion of domiciled aliens is tenuous, since expulsion does not involve negotiations with foreign governments and those expelled are not defined in terms of nationality.

The view in *Harisiades* that expulsion is not limited by ordinary principles of substantive due process stems from the erroneous assumption that the alien is an unassimilated element who enjoys this country's hospitality without contributing anything in return, and to whom, therefore, there is owed no obligation of decent treatment in the withdrawal of the hospitality. The Founders, however, included aliens as well as citizens in the obligation of decent treatment expressed by the due process clause. They did so because they realized that America needs the immigrant and that he is not merely a recipient of a gratuity. The immigrants contribute to our economy and society, give their children to populate the land, and become sociologically a part of American society. Since the immigrant does contribute to and is a part of our society, he is entitled to due process, both substantive and procedural.

IV.

A. The statute here involved meets the definitions of both a bill of attainder and an *ex post facto* law as previously set out by this Court, if it inflicts punishment. *Galvan* and *Harisiades* both stated that "deportation is not punishment." It is, however, not appropriate to inquire in the abstract and conceptualistically whether expulsion is punishment. The appropriate question is whether the particular expulsion provision inflicts punishment, and the answer will vary upon the nature of the legislation. In the words of the Court, "Whether legislative action curtailing a privilege previously enjoyed amounts to punishment depends upon the circumstances attending and the causes of the deprivation."

A deprivation of a privilege is punishment unless it is based on general standards which establish reasonable tests of fitness to enjoy the privilege. As applied to expulsion legislation, a deprivation of the residence privilege is not punishment only if it establishes general standards reasonably relevant to ridding the country of aliens whose continued residence is hurtful.

If, as assumed in *Galvan* and *Harisiades*, the test of punishment is the nature of the privilege removed, rather than the basis for its removal, then it is indeed anomalous to hold that so harsh a consequence as the loss of residence cannot be punishment.

B. Under the proper test, the statute is clearly punishment. It establishes no standards at all of alien undesirability, a process which would necessarily involve a statement of culpable characteristics. All the statute does is to expel members of a named organization. This is not an establishment of standards or qualifications. It is merely an identification of the persons to be expelled. Furthermore, the statutory cause for expulsion—mere membership no matter how remote or innocent—is not reasonably connected to the objective of removing aliens whose continued residence is injurious to our society.

V.

The statute violates the First Amendment because it is a reprisal for the exercise of protected rights of assembly and expression.

Harisiades upheld expulsion of aliens for past membership in organizations advocating the violent overthrow of the government. The holding was based

on the pernicious nature of the advocacy involved and on an asserted right of Congress to distinguish between the advocacy of peaceable change and the teaching of violence.

The statute here makes no such distinction. It expels aliens for being members of an organization which did not during their period of membership advocate illicit doctrine.

Harisiades itself sustained an unjustifiable interference with First Amendment rights, since it authorized deportation not for anything the alien himself did or said, but solely because of the guilty advocacy of the organization. Furthermore, it disregarded the clear and present danger test. The statute here is an even greater invasion of the First Amendment than the provision sustained in *Harisiades*, and it cannot be justified even under that decision.

ARGUMENT

I. PETITIONER WAS ONLY A NOMINAL MEMBER OF THE COMMUNIST PARTY AND HENCE IS NOT DEPORTABLE. AT A MINIMUM, THE CASE MUST BE RETURNED FOR ADMINISTRATIVE DETERMINATION OF THE NATURE OF THE MEMBERSHIP

A. Nominal Party Membership Is Not a Ground for Deportation

Galvan v. Press, 347 U. S. 522, construed the statute requiring the deportation of aliens who had ever been members of the Communist Party as not applying to persons who had been only "nominal members" (at 527). The Court found that the petitioner in that case had been shown to be more than a nominal member and hence was deportable (at 529).

In discussing the concept of nominal membership, *Galvan* pointed out that in 1951 Congress specifically declared that it did not intend the term "member" to cover aliens who "had joined a proscribed organization (1) when they were childrens (2) by operation of law, or (3) to obtain the necessities of life" (at 527). The opinion added, however, that "Congress did not provide that the three types of situations it enumerated in the 1951 corrective statute should be the only instances where membership is so nominal as to keep an alien out of the deportable class" (at 527).

The opinion further noted (at 527) that Congress specifically approved the following language from *Colyer v. Skeffington*, 265 Fed. 17, 72:

"Congress could not have intended to authorize the wholesale deportation of aliens who, accidentally, artificially, or unconsciously in appearance only, are found to be members of or affiliated with an organization of whose platform and purposes they have no real knowledge."

Galvan concluded on this subject (at 528):

"It must be concluded, therefore, that support, or even demonstrated knowledge, of the Communist Party's advocacy of violence was not intended to be a prerequisite to deportation. It is enough that the alien joined the Party, aware that he was joining an organization known as the Communist Party which operates as a distinct and active political organization, and that he did so of his own free will."

Galvan establishes, therefore, that in order to support a deportation order the government must prove more than Party membership alone. Since it

has the burden of proving deportability,² it must prove that the membership was more than nominal by showing that the alien had engaged in such activity as a member as to take him out of the nominal class. The evidence must exclude such situations, as well as others embraced within the concept of nominal, as that the alien joined the Party when he was a child, by operation of law, or to obtain the necessities of life; or that he was accidentally, artificially, or unconsciously in appearance only a member of the Party, of whose platform and purposes he had no real knowledge; or that he was not aware that the Party operated as a distinct and active political organization.

B. Petitioner Was No More Than a Nominal Member

In *Galvan*, the petitioner had belonged to the Party for two years from 1944 to 1946 (at 523-4). He was an active and leading member, having "been active in the Spanish Speaking Club, and indeed, one of its officers" (at 529). Unlike the petitioner in this case, Galvan had refrained from applying for American citizenship out of fear that his Party membership might thereby become known to the authorities (at 528-9). On these facts the Court held that Galvan had been more than a nominal member and therefore was deportable.

The petitioner in this case, however, was merely a nominal member. He belonged to the Party for only about six months. He held no office and was not an active member. His sole activity was to run a book-

² The current immigration law expressly provides that, "No decision of deportability shall be valid unless it is based upon reasonable, substantial and probative evidence." Sec. 242(b)(4), Immigration and Nationality Act, 8 U. S. C. sec. 1252(b)(4).

store for a short time, and this activity was that of a sales clerk, not as a Party member.

Furthermore, petitioner falls within two of the classes of members expressly described as non-deportable in *Galvan*. He was, in the first place, one who joined the Party "to obtain the necessities of life." As petitioner described his purpose in joining (R. 26):³

"... it seemed to me that it came hand in hand—the Communist Party and the fight for bread. It seemed to me like this—let's put it this way—that the Communist Party and the Workers' Alliance had one aim—to get something to eat for the people."

He was not, he testified (R. 31), motivated by "dissatisfaction in living under a democracy." Instead, the situation was (R. 31):

"Just a matter of having no jobs at that time. Everybody around me had the idea that we had to fight for something to eat and clothes and shelter. We were not thinking then—anyways the fellows around me, of overthrowing anything. We wanted something to eat and something to crawl into . . . We had to go and ask those who had it—that was the courthouse at that time. We petitioned city, state and national government. We did and we succeeded. We finally got unemployment laws and a certain budget."

³ Since the sole evidence upon which the deportation order rests is the petitioner's voluntary statement, the government must take that statement with all its qualifications as made. There was not here, as in *Galvan*, the testimony of a witness against the alien, upon which findings contrary to the statement of the petitioner could rest.

It does not matter that there may have been other avenues open to petitioner "to obtain the necessities of life" during the depression, or that the one he chose involved participation of others seeking the same end. He joined to obtain food and shelter, and in fact met with some success.

Secondly, petitioner was not, in the words of *Galvan*, aware that the organization he joined operated "as a distinct and active political organization," and he had "no real knowledge" of its "platform and purposes." He stated that he joined the Party because he saw it as engaging in "the fight for bread;" that it "had one aim—to get something to eat for the people;" that at the few Communist meetings he attended: ". . . nothing was ever said about overthrowing anything. All they talked about was fighting for the daily needs. That is why we never thought much of joining those parties in those days." In joining an organization whose one aim was, he thought, to fight for bread, petitioner was not thereby committing himself to a political platform as commonly understood. He gave no thought to the organization as a distinct political organization. Persons could join such an organization and retain their adherence to the Republican, Democratic, or other political parties.

**C. At a Minimum the Case Must be Returned for
Administrative Reconsideration**

At a minimum the case should be returned to the Immigration and Naturalization Service to determine whether petitioner is a nominal member within the meaning of *Galvan v. Press*.

The decision of the Hearing Officer was handed down on May 15, 1951 (R. 16-19), and the affirming

decision by the Board of Immigration Appeals on March 28, 1952 (R. 9-11). The latter action thus preceded by more than two years the decision in *Galvan*. Both the Hearing Officer and the Board of Immigration Appeals found merely that the petitioner had been a "member" of the Communist Party (R. 11, 19). Neither considered the question of whether that membership was merely nominal, and the finding, therefore, was not coextensive with the meaning of membership established in *Galvan*. Since a finding of membership properly defined is essential to support a deportation order, the order must be reversed for the failure to make a finding on proper premises, even if the evidence could have supported such a finding. *Mahler v. Eby*, 264 U. S. 32.

The government itself recognized the necessity to reconsider a deportation order made before *Galvan* in the light of *Galvan's* qualifications of the term "member." After this Court had granted certiorari in *Garcia v. Landon*, 347 U. S. 1011, the government filed a suggestion of mootness, in which it stated that in view of the language in *Galvan*, it had set aside the deportation order so as to permit an administrative determination of whether Garcia was only a "nominal member." On the basis of this suggestion, the Court dismissed the writ as moot. 348 U. S. 666.

Since the Service here has failed to consider the correct legal standard of nominal membership, its order must be set aside. For if an administrative order is based by an agency on an unsound legal premise, it cannot be sustained even if it might have rested on valid premises. In such a case, the order must be remanded for administrative redetermination.

N.L.R.B. v. Virginia Electric and Power Co., 314 U. S. 469; *S.E.C. v. Chenery Corp.*, 318 U. S. 80; *Federal Power Commission v. Idaho Power Co.*, 344 U. S. 17, 20.

II. THE COURT SHOULD RECONSIDER *GALVAN v. PRESS*

A. Galvan Represents an Abnegation of the Judicial Function

Although *Galvan v. Press* was decided as recently as May, 1954, there are compelling reasons for the Court to reconsider its holding that the statute here involved is constitutional. These exist over and above the inconclusive role of stare decisis in cases involving major constitutional questions,⁴ particularly those affecting personal liberty.

Galvan established (1) that the due process clause does not limit Congress' power to declare which aliens shall be expelled, and (2) that the ex post facto clause (and on a like basis the bill of attainder clause) does not apply to expulsion legislation because deportation is not punitive. According to *Galvan*, Congress may expel aliens for causes which have no rational relationship to their desirability as residents, and which may be wholly arbitrary, whimsical, or worse. These causes may long antedate the expulsion legislation. They may be reprisals for the exercise of First Amendment rights.⁵ Congress may even require the expulsion of aliens who are or were members of a named organization, which is the same thing as expelling aliens by name.

⁴ See cases collected in fn. 10 of *Smith v. Allwright*, 321 U.S. 649, 665.

⁵ This was the factual situation in *Galvan*. Yet the majority opinion makes no reference to the First Amendment.

These rules of unrestricted power established by *Galvan* are of tremendous consequence to the entire alien community, to all citizens who are bound to resident aliens by ties of blood, affection or financial interest, to the status of our nation as a free society, and to its good repute in the world community of nations. On its face the rules are, to say the least, of doubtful validity. *Galvan* recognized as much, saying (at 530-1):

“ . . . considering what it means to deport an alien who legally became part of the American community, and the extent to which, since he is a ‘person,’ an alien has the same protection for his life, liberty and property under the Due Process Clause as is afforded to a citizen, deportation without permitting the alien to prove that he was unaware of the Communist Party’s advocacy of violence strikes one with a sense of harsh incongruity. If due process bars Congress from enactments that shock the sense of fair play—which is the essence of due process—one is entitled to ask whether it is not beyond the power of Congress to deport an alien who was duped into joining the Communist Party, particularly when his conduct antedated the enactment of the legislation under which his deportation is sought. And this because deportation may, as this Court has said in *Ng Fung Ho v. White*, 259 U.S. 276, 284, deprive a man ‘of all that makes life worth living’; and, as it has said in *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10, ‘deportation is a drastic measure and at times the equivalent of banishment or exile.’

“In light of the expansion of the concept of substantive due process as a limitation upon all powers of Congress, even the war power, see *Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U.S. 146, 155, much could be said for the

view, were we writing on a clean slate, that the Due Process Clause qualifies the scope of political discretion heretofore recognized as belonging to Congress in regulating the entry and deportation of aliens. And since the intrinsic consequences of deportation are so close to punishment for crime, it might fairly be said also that the ex post facto Clause, even though applicable only to punitive legislation, should be applied to deportation."

Galvan, however, did not examine on principle the serious constitutional questions raised by the legislation. Although the Court had never before passed on the validity of a comparable statute,⁶ the majority in *Galvan* considered the issues settled by a supposed course of prior decisions. As the opinion continued (at 531-2):

"But the slate is not clean. As to the extent of the power of Congress under review, there is not merely 'a page of history,' *New York Trust Co. v. Eisner*, 256 U.S. 345, 349, but a whole volume. Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government. . . . that the formulation of these policies is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of government. And whatever might have been said at an earlier date for applying the ex post facto Clause, it has

⁶ The closest legislation previously considered was that sustained in *Harisiades v. Shaughnessy*, 342 U.S. 580, which Justice Murphy, concurring in *Bridges v. Wixon*, 326 U.S. 135, 157-166, had earlier considered unconstitutional. Though we believe that *Harisiades* was wrongfully decided, at least this much must be said for it, that unlike *Galvan* it did make some independent examination of the constitutional questions involved.

been the unbroken rule of this Court that it has no application to deportation.

"We are not prepared to deem ourselves wiser or more sensitive to human rights than our predecessors, especially those who have been most zealous in protecting civil liberties under the Constitution, and must therefore under our constitutional system recognize congressional powers in dealing with aliens, on the basis of which we are unable to find the Act of 1950 unconstitutional. See *Bugajewitz v. Adams*, 228 U.S. 585, and *Ng Fung Ho v. White*, 259 U.S. 276, 280."

One questions that so much abnegation of the judicial function is ever warranted, it being "revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV", especially "if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." Holmes, *Collected Legal Papers* (1952) p. 187, quoted in Douglas, *We, the Judges*, p. 430. Moreover, the surrender in *Galvan* rests on mistaken premises. It is correct that the slate was not clean, but the Court misread its markings. As we show in what follows, it is not true that prior decisions had established that policies pertaining to the right of aliens to remain here are so "exclusively entrusted" to Congress as to be immune to constitutional restrictions. There is no "unbroken rule" that the ex post facto clause has no application to deportation legislation. Nor did such civil libertarians as Justice Holmes, who wrote the opinion in *Bugajewitz*, or Justice Brandeis, who wrote the opinion in *Ng Fung Ho*, commit themselves to the views that Congress may arbitrarily choose victims for expulsion or may expel named aliens or groups. Justice

Holmes and Brandeis do not deserve the imputation that they would have sustained a statute expelling aliens, who were Jewish or Catholic or believed in Irish independence.

B. Galvan Misreads History

What the Court did in *Galvan*, as in *Harisiades v. Shaughnessy*, 342 U. S. 580, was to rely on generalizations taken out of their historical and decisional context, meantime inexplicably ignoring contrary generalizations.⁷ These generalizations—that the deportation power is unlimited and that deportation is not punishment—derive originally from decisions dealing with exclusion legislation or with expulsion legislation ancillary to exclusion. They were then repeated in connection with legislation which reasonably defined in terms of culpable characteristics classes of aliens who were undesirable residents at the time of expulsion. These decisions, dealing as they do with subjects not comparable to those involved in *Galvan*, do not support *Galvan*.

⁷ Thus in accepting the generalization that "deportation is not punishment," *Harisiades* and *Galvan* overlooked such statements as the following: "That deportation is a penalty—at times a most serious one—cannot be doubted." *Bridges v. Wixon*, 326 U. S. 135, 154. "Deportation can be the equivalent of banishment or exile." *Delgadillo v. Carmichael*, 332 U. S. 388, 391. "... deportation is a drastic measure and at times the equivalent of banishment or exile ... It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty." *Tan v. Phelan*, 333 U. S. 6, 10. "Despite the fact that this is not a criminal statute, we shall nevertheless examine the application of the vagueness doctrine to this case. We do this in view of the grave nature of deportation. The Court has stated that, ... deportation is a drastic measure and at times the equivalent of banishment or exile. ... It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty." *Jordan v. DeGeorge*, 341 U. S. 223, 231.

Leaving aside for the moment the unpopular and short-lived Alien Act of 1798 which was never applied, our early deportation laws were enacted solely in aid of exclusion laws and to prevent evasion of admission requirements. Konvitz, *The Alien and the Asiatic in American Law*, p. 47; Maslow, *Deportation Law: Proposals for Reform*, 56 Col. L. Rev. 309, 312. The first laws were directed against Chinese laborers, and provided both for their exclusion and for their expulsion if "found unlawfully within the United States." Maslow, *op. cit. supra, id.* The exclusion provision of the Act was upheld in *Chae Chan Ping v. United States*, 130 U. S. 581, decided in 1889, on the theory that Congress had full unreviewable power to *exclude* any aliens. In reviewing the Act, the Court described Chinese laborers as follows (at 595): "... they remained strangers in the land, residing apart by themselves, and adhering to the customs and usages of their own country. It seems impossible for them to assimilate with our people or to make any change in their habits or modes of living." The Court gave no consideration to the power of Congress to *expel* lawfully admitted resident aliens, and indeed commented (at 611) that the Alien Act of 1798, then the only legislation which had ever provided for the expulsion of resident aliens, was "entirely different from the Act before us."

The subsequent exclusion case of *United States ex rel Turner v. Williams*, 194 U. S. 279, decided in 1904, commented (at 292) that an alien seeking admission is not entitled to the protection of the Constitution which covers only those within the country. Cf. *Johnson v. Eisentrager*, 339 U. S. 763. The Court repeated the admonition made in *Chae Chan Ping, supra*, that

nothing in its decision should be taken as upholding the validity of the Alien Act of 1798 (at 294-5).

The first case to uphold an act of expulsion and the source of the generalization that "deportation is not punishment" is *Fong Yue Ting v. United States*, 149 U. S. 698, decided in 1893. The statute there involved had been enacted as an aid in enforcement of the statute excluding Chinese laborers which had been upheld in *Chae Chan Ping, supra*. It provided that all Chinese in the country who could not produce a certificate of residence would be deemed to be unlawfully within the country, and could accordingly be deported. It also provided that a Chinese resident in the country could obtain such a certificate only by establishing his lawful residence by "at least one credible white witness." The statute was sustained as a necessary auxiliary to the power to exclude and as resting upon the unreviewable power of Congress to exclude, as upheld in *Chae Chan Ping v. United States, supra*. The aliens in question were ordered deported because although they were able to prove their lawful admission by the testimony of Chinese witnesses, they could not produce "one credible white witness" as required by the statute.

The statute, of course, based as it was on blatant racism, was a barbarity. *Fong Yue Ting* fits within the description of "a case that represents, historically and juridically, an episode of the dead past as unrelated to the world of today as the one-hoss shay is to the latest jet airplane," (Frankfurter, J., in *Kinsella*

⁸ Justice Brewer, dissenting, commented at 744: "In view of this enactment of the highest legislative body of the foremost Christian nation, may not the thoughtful Chinese disciples of Confucius fairly ask, why do they send missionaries here?"

v. *Kruger*, 351 U. S. 470, 482). The holding in *Fong Yue Ting* could not be followed today, since even *Galvan* recognizes (at 531) that expulsion policies must be enforced within the confines of procedural due process. And see *Wong Yang Sung v. McGrath*, 339 U. S. 33, 49. Moreover, *Fong Yue Ting* is irrelevant as well as obsolete. It involved a statute considered to apply to illegal entrants and thus to be ancillary to the exclusion process. The legislation did not, ostensibly at least, expel persons who had lawfully entered the United States for causes unconnected with their entry. Under the circumstances, it would be unfitting for the Court to rely upon the generalizations in *Fong Yue Ting* to the effect that the power to expel, like that to exclude, is an inherent right of sovereignty and lies in the area of political questions.

The cases which immediately followed *Fong Yue Ting* did not read it broadly, being careful to recognize that its theses applied only to legislation dealing with persons who had entered illegally. *Japanese Immigrant Case*, 189 U. S. 86, 97, 98, 100 (1903); *U. S. ex rel Turner v. Williams*, *supra*, at 289-290, *supra*, (1904); *Keller v. United States*, 213 U. S. 138, 143-4 (1909). Moreover, in *Turner*, the Court again expressed doubts (at 294-5) as to the validity of the Alien Act of 1798,⁹ a view which would be untenable under the theory of *Galvan*.

Accordingly, as of 1909, this Court had considered the expulsion power only as applied to persons who had illegally entered or as an auxiliary to existing ex-

⁹ These doubts existed as late as 1948. See *Ludcke v. Watkins*, 335 U. S. 460, 471, fn. 18.

clusion legislation. It had not considered any case involving expulsion of a lawfully admitted domiciled alien for conduct engaged in after admission. Obviously, none of the cases so far reviewed, whatever language any may contain, furnishes valid support for *Galvan*.

The view has been taken that the power to expel can properly be exercised only as an adjunct to enforcement of exclusionary laws. See Maslow, *op. cit.*, at 321-324; Corsi, *Paths to the New World: American Immigration—Yesterday Today and Tomorrow* (1953) 40. Cf. Boudin, *The Settler Within Our Gates*, 26 N.Y.U. L. Rev. 266, 451, 634 (1951). A persuasive case could be made to this effect under the Ninth and Tenth Amendments. However, beginning with 1912, this Court did sustain the expulsion of lawfully-admitted aliens. These cases are surprisingly few in number, none of them serves as a valid precedent for *Harisiades* and *Galvan*, and none can legitimately be taken to foreclose the issues involved in *Galvan*.

The first two of these cases, *Low Wah Suey v. Backus*, 225 U. S. 460 (1912) and *Zakonaite v. Wolf*, 226 U. S. 272 (1912), represent a transition from the exclusion cases. They sustained a statute requiring expulsion of any alien who practiced prostitution within three years after entry. Since the statute had been in effect at the time of the alien's entry, and in view of the short time limitation, the Court readily upheld it as imposing a condition subsequent on the entry and thus as an aid to exclusion policy.

The first full-fledged expulsion case was *Bugajewitz*

v. *Adams*, 228 U. S. 585 (1913),¹⁰ cited in *Galvan*. That sustained the statute expelling prostitutes, as amended to remove any limitation of time on the commission of the offense after entry, but as applied in the particular case to an alien who was currently a prostitute. The opinion, written by Justice Holmes, stated (at 591):

"It is thoroughly established that Congress has the power to order the deportation of aliens whose presence in the country it deems hurtful. . . . nor is the deportation a punishment; it is simply a refusal by the Government to harbor persons whom it does not want. . . . The prohibition of *ex post facto* laws in article 1, § 9, has no application. . . . and with regard to the petitioner it is not necessary to construe the statute as having any retrospective effect."

Galvan was not justified in considering that the characteristically terse opinion in *Bugajewitz* releases expulsion legislation from the restrictions of substantive due process and under all circumstances from the *ex post facto* clause. The *Bugajewitz* statute estab-

¹⁰ *Tiaco v. Forbes*, 228 U. S. 549, decided a week before *Bugajewitz*, upheld the power of the Philippine government to expel certain Chinese aliens summarily at the request of the Chinese Government. The grounds for the expulsion, other than that it was at the request of the Chinese government, does not appear from the opinion. The case is as obsolete and ill-considered as *Fong Yue Ting*, on which it relied, and contains no analysis of the constitutional questions which were involved. It sanctioned a summary expulsion without any aspects of procedural due process in conflict with the doctrine of the earlier *Japanese Immigrant Case*, *supra*, which has been re-affirmed by this Court as recently as *Wong Yang Sung v. McGrath*, 339 U. S. 33. Because of its peculiar facts, and the reliance of the Governor General of the Philippines on Spanish law, the case can have no significance for the problems posed here. It was regarded by the Senate in 1940 as having no possible application beyond its peculiar facts. See Sen. Rep. 331, 76th Cong. 3rd Sess., at p. 4.

lished a class of aliens who had demonstrated the undesirability of their continued presence by engaging in immoral and harmful conduct. The reasonableness of the classification was clear, except in so far as it could include persons who had abandoned the practice of prostitution long before the time of the expulsion proceeding. This questionable feature, however, was not to the fore in *Bugajewitz* because of the facts in the case.

Bugajewitz, therefore, merely sustained the power to expel aliens whose continued presence in the country was reasonably "deemed hurtful" on the basis of their own culpable conduct. This is a far cry from holding that there is no due process limitation on expulsion; or that Congress may expel aliens who have not been guilty of culpable conduct and who may not reasonably be classed as undesirables; or that Congress may expel aliens by name. Similarly, the expulsion upheld in *Bugajewitz* was not punishment because the alien was deprived of the residence privilege by reason of a demonstrated unfitness to enjoy the privilege. It does not follow that expulsion can never be punishment, or that it is not punishment if there is no reasonable basis for supposing the alien's unfitness. See *infra*, pp. 53-59. The statements in *Bugajewitz* that "the deportation" is not "a punishment," and that the *ex post facto* clause "has no application"¹¹ should not, by mechanical jurisprudence, be applied to all expulsion legislation whatever its nature.

¹¹ It is significant that the only authority cited by Justice Holmes for the non-applicability of the *ex post facto* clause merely held that the clause did not bar revocation of naturalization procured by fraud. *Johannessen v. United States*, 225 U. S. 227. Moreover, read in its context, the opinion does not appear to say anything more than that the *ex post facto* clause does not apply to the case. It does not say that the clause has no application to any deportation.

The other case primarily relied on by *Galvan* is even less apposite. *Ng Fung Ho v. White*, 259 U. S. 276, did not deal with the expulsion of a lawful entrant. It merely approved a retrospective change in the procedure for deportation for a fraudulent entry, and in the opinion (at 280) approvingly cited the language from *Bugajewitz* that "Congress has power to order at any time the deportation of aliens whose presence in the country it deems hurtful."

Following *Bugajewitz* and prior to *Harisiades*, only three cases in this Court discussed the validity of legislation providing for the expulsion of legally admitted aliens.¹² *Mahler v. Eby*, 264 U.S. 32, sustained a statute expelling aliens who had been convicted even prior to the legislation of crimes involving national security and who were found to be currently undesirable residents.¹³ The statute involved, like that in *Bugajewitz*, made a reasonable classification of persons who had demonstrated that they were undesirable residents at the time of the expulsion. It therefore did not violate due process or inflict punishment. Although the opinion contains broad phraseology borrowed from *Fong Yue Ting*, *supra*, the essential holding in the case is set out in the following passage at 39: "Con-

¹² The Court has in other cases upheld the deportation of legally admitted aliens. But its opinions in these cases did not discuss the validity of the legislation authorizing the deportation, but discussed only questions of evidence or procedure. See e.g., *United States ex rel Bilokumsky v. Tod*, 263 U. S. 149; *Tisi v. Tod*, 264 U. S. 131; *United States ex rel Claussen v. Day*, 279 U. S. 398. None of these statutes, moreover, involved the objectionable features present in the statute under review here and in *Galvan*.

¹³ The Court reversed the deportation orders in question because of the failure of the Secretary of Labor to find that the aliens were currently undesirable residents.

gress, by the Act of 1920, was not increasing the punishment for the crimes of which petitioners had been convicted, by requiring their deportation if found undesirable residents. It was, in the exercise of its unquestioned right, only seeking to rid the country of persons who had shown by their career that their continued presence here would not make for the safety or welfare of society." The case cannot support the proposition that Congress may expel resident aliens whose conduct has not demonstrated that their continued presence would be deleterious to the country's welfare. The Court's statement (at 39) that the *ex post facto* clause applies only to "criminal laws" is obviously an overstatement, in view of the line of cases beginning with *Cummings v. Missouri*, 4 Wall 277, which hold that a deprivation of civil privileges may constitute punishment and may violate the *ex post facto* and bill of attainder clauses. See *infra*, pp. 54-55. Moreover, the subsequent passage in the opinion (at 39), that the *ex post facto* clause does not apply "to a deportation act like this" (emphasis supplied) should not be stretched to mean that it does not apply to any deportation statute. See *infra*, p. 58.

In *Bridges v. Wixon*, 326 U. S. 135, Justice Murphy, concurring, discussed the constitutionality of the statute later sustained in *Harisiades*, and expressed the view that the legislation was invalid. The case was decided on a non-constitutional ground.

Finally, *Jordan v. DeGeorge*, 341 U. S. 223, represents a recognition by the Court that expulsion legislation is subject to the restrictions of due process. The statute there provided for the expulsion of an alien sentenced more than once to imprisonment of one year or more for a crime involving moral turpitude. The

Court sustained the statute as not unconstitutionally vague, stating (at 231):

“Despite the fact that this is not a criminal statute, we shall nevertheless examine the application of the vagueness doctrine to this case. We do this in view of the grave nature of deportation. The Court has stated that ‘. . . deportation is a drastic measure and at times the equivalent of banishment or exile. . . . It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty.’ *Fong Haw Tan v. Phelan*, 333 U. S. 6. We shall therefore, test this statute under the established criteria of the ‘void for vagueness’ doctrine.”

Justice Jackson, in a dissent joined by Justices Black and Frankfurter, held that the statute was invalid because of the vagueness of the term moral turpitude. The dissenting opinion said (at 232):

“Respondent, because he is an alien, and because he has been twice convicted of crimes the Court holds involve ‘moral turpitude,’ is punished with a life sentence of banishment in addition to the punishment which a citizen would suffer for the identical acts.”

It added (at 243):

“A resident alien is entitled to due process of law. We have said that deportation is equivalent to banishment or exile. Deportation proceedings technically are not criminal; but practically they are for they extend the criminal process of sentencing to include on the same convictions an additional punishment of deportation. If respondent were a citizen, his aggregate sentences of three years and a day would have been served long since and his punishment ended. But because of his alienage, he is about to begin a life sentence

of exile from what has become home, of separation from his established means of livelihood for himself and his family of American citizens. This is a savage penalty. . . .”

The Court's opinion in *Jordan v. DeGeorge* is inconsistent with, and the dissenting opinion is irreconcilable with, the views adopted by *Harisiades* and *Galvan* that the expulsion power is not restricted by due process and that expulsion can never be punishment.

The preceding review demonstrates that *Galvan* misread the Court's prior decisions. These decisions had established only that Congress has an unlimited power to exclude aliens, including the power to deport for illegal entry; that it may employ the expulsion power to implement exclusion policy or to remove resident aliens who have demonstrated by their conduct that their continued presence in the country would be harmful; and that such legislation is not punishment. Generalizations to the effect that the expulsion power is unlimited and that deportation is never punishment are not supported by the decisions and are contradicted by contrary generalizations.

Harisiades made new constitutional law in the expulsion field. It was the first case in this Court to sustain, or even to involve, expulsion for conduct after lawful admission, which was not culpable when it occurred, and which had happened many years before the enactment of the legislation. It was also the first case to hold valid legislation expelling aliens for organizational membership. *Harisiades*, for reasons which appear subsequently, was wrongfully decided. *Galvan* goes beyond *Harisiades*. It involves all the questionable features of *Harisiades* and in addition

sustains a statute expelling aliens for membership in a named organization. There is no basis in history for the assumption in *Galvan* that the issues there involved were foreclosed by prior decisions. And since the due process clause protects resident aliens, it restricts the exercise of the expulsion power, substantively as well as procedurally.

III. THE STATUTE, ON ITS FACE AND AS HERE APPLIED, VIOLATES DUE PROCESS.

A. The Statute Is Invalid as Special Legislation

Once the statute is examined on the basis of constitutional principle, there can be no doubt that it violates the due process clause. *Galvan v. Press* virtually recognized as much, pointing out that the legislation "strikes one with a sense of harsh incongruity" and questioning whether it is not among "enactments that shock the sense of fair play—which is the essence of due process" (at 530).

The most striking of the statute's features which violate due process is that it is special legislation. This act is the first and so far the only statute which expels aliens for membership in a specifically named organization, rather than by a descriptive classification of persons or organizations. On principle, the situation is the same as if Congress had listed the names of aliens to be deported. If Congress can make a valid determination that every past and present member of the Communist Party is an undesirable resident and must be expelled if an alien, it can validly make the same determination as to Charles Rowoldt by name or any other individual.

The statute's condemnation by legislative fiat is fundamentally repugnant to due process. If the con-

stitutional clause means anything, it means that guilt cannot be legislated and that individuals and organizations can not be condemned without a hearing. Congress itself, recognized as much in a sorer climate, when, despite its hostility to Harry Bridges, it refused to enact a bill providing for his deportation. Representative Hobbes, though favoring Bridges' deportation, opposed the bill because it "frankly transgresses one of the cardinal principles which our founding fathers would have died to preserve inviolate." 86 Cong. Rec. 8201. And the Senate shared the view of Attorney General Jackson that the bill was obnoxious and its enactment "would be an historical departure from an unbroken American practice and tradition." Sen. Rep. 2031, 76th Cong., 3d Sess., p. 9.

The government defends the statute on the ground that it is a reasonable legislative judgment, based on evidence considered by Congress, that the Communist Party is a pernicious organization. Due process, however, prohibits condemnation by legislative fiat even if there is reason to believe that the victim is getting what he deserves. The due process clause requires not simply that condemnation appear reasonable or deserved, but that it be made by a civilized and fair method.

If the case were otherwise, the due process clause would be an impotent safeguard. For the fact is that governmental persecution and repression are always supported by contemporaneous "evidence" of its reasonableness. The persecution of Jews was justified by "evidence," including supposedly scientific data that they were a mentally depraved group, dedicated to the practice of ritual murder and subornation of the

state. The slaveholders had "evidence" that the Negro was an inferior being whose enslavement was for his own good, and similar "evidence" is still currently cited in support of legislation enforcing segregation and discrimination against the Negro people. Persecutions of Catholics, Protestants, Quakers, Mormons, Chinese, Socialists, and members of labor unions have always been supported by "evidence" justifying measures of retribution.

The moral is that it is not safe, nor civilized, nor due process to permit legislative determination of the guilt of named individuals or groups no matter how clear their guilt appears to be. This holds particularly true in the case of aliens, who lacking the franchise are unable to protect themselves by political action. If this statute is upheld, the alien is at the mercy of Congress without any protection from the due process clause. Whatever organization he joins or has ever joined may sometime in the future be singled out for repressive measures. He may be expelled for being a Jew, a Mormon, a Catholic, or a trade union member. Whatever the cause, we may be sure that the legislature will be acting on "evidence" which some lawyers will be able to describe as "reasonable."

B. The Statute Is Invalid as an Irrational Deprivation of Liberty

The statute discriminates against resident aliens who were ever members of the proscribed organizations and imposes on them the harsh and often cruel reprisal of expulsion. Due process requires that this deprivation of liberty "shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object

sought to be obtained." *Nebbia v. New York*, 291 U.S. 502, 525.

The sole justification of the expulsion power is that it enables the state to remove from its territory undesirable alien residents. Even aside from its characteristic as fiat legislation, the statute violates the process because it is so capricious an exercise of the expulsion power as to shock the conscience, and because it imposes a cruel sanction for reasons having no rational relation to the expulsion function.

The statute expels an alien solely because of organizational membership. This imputation of guilt by association is an offensively irrational means of adjudging the alien an undesirable resident. The irrationality is magnified by the fact that the statute makes no accommodation for the nature of the alien's connection with the organization. He may have had no knowledge of the claimed evil nature of the organization; his activities in the organization may have been innocuous, commendable, or limited to the exercise of constitutional rights; his membership may have been for a brief period; it may have existed long before the expulsion and long before the legislation making it cause for expulsion and may have been as remote as 1919 when the Communist Party was formed; the alien may never have had Communist beliefs, or, if he did, may have long ago abandoned them.

Such a statute cannot be reconciled with the due process principle of *Wieman v. Updegraff*, 344 U.S. 183. *Wieman* held that individuals could not be barred from governmental employment by reason of organizational membership unaccompanied by knowledge on their part of the guilty nature of the organization.

Surely government control over its own employment policies is at least as broad as its expulsion power, and deprivation of governmental employment is much less severe a sanction than expulsion.

The present case fully illustrates the cruel irrationality of the statute. There is no rational basis for a judgment that the petitioner is an undesirable resident because about twenty years ago, in a different political climate and before enactment of the deportation statute, he belonged to the Communist Party for six months, having joined it to struggle by peaceable means for bread and shelter for the unemployed, and while in it having sold books in a public bookstore. Yet petitioner, at the age of 72, having lived in this country for over forty years, is being uprooted and sent to a country which has become strange to him.

Nor is petitioner's case atypical. As all informed persons are aware, whatever else it is or was, the Communist Party since its beginning has extensively engaged in legitimate political activity and has zealously promoted numerous reforms and the economic advancement of workers. Hundreds of thousands, citizens and aliens, have at one time or another joined or supported it, not to foment insurrection but in a search for the solution of economic problems and for the betterment of society.

We have filed as an appendix to this brief the results of a study of political expulsion cases. This survey documents the inhumanity and lack of legitimate purpose of the policy of expelling persons on the ground of past Communist Party membership. The survey shows, for example, that as many as 46% of the aliens were charged with membership which

lasted only for two years or less and 15% with membership of one year or less (Appendix, Table 18), and that in a large majority the Party membership had ended long before the expulsion proceeding (Table 17). In only 4 out of 307 political cases did the government press charges of personal belief or advocacy rather than mere organizational membership or affiliation (Table 16). 60% of the victims entered the United States while they were minors, almost a third having been under 15 years of age (Table 2). 94% of them have lived in this country for more than 20 years, as many as 60% of them for over 40 years (Table 3). Over 66% of them are more than 55 years old, and a quarter are over 65 years of age (Table 1). They work in varied lawful pursuits and live throughout the country (Tables 5, 7). They have married American citizens and have American children and grandchildren (Table 9). They and their children have aided the United States in war-time (Table 8). Like appellant, many of them have tried to become American citizens (Table 10). They have lost their ties to their native country, most of them having no close relatives abroad and many being unable to speak the language of the country of their origin (Table 11). The expulsion of these persons does not represent a reasonable judgment that their continued presence in the country is undesirable or dangerous.

The irrationality of the statute is further revealed by the fact that Congress has provided that aliens, like the petitioner, are eligible for citizenship if their membership in the Communist Party has ceased more than ten years ago, 8 U.S.C. sec. 1424(c), thus indicating a judgment that they are neither undesirable or dangerous. But this statute has been applied by the Service as a trap for aliens, since the application for

citizenship and the accompanying required disclosure of past affiliation results, as was the case here, in the institution of deportation proceedings. See *Whom We Shall Welcome*, Report of the President's Commission on Immigration and Naturalization (1953) 194.

The government's contention that Congress could reasonably believe that the Communist Party advocates doctrines of violence is besides the point. The government is deporting Rowoldt, not the Communist Party. It is not expelling insurrectionary doctrine, seditious advocacy, or whatever else it charges against the Communist Party. Instead, to the shame of America's reputation before the world, it is deporting a 72 year old man who has lived here for more than 40 years because long ago during the depression he showed concern for the unemployed.

Moreover, contrary to the government's contention, the legislation is irrational in its proscription of the organizations it names as well as in its condemnation of all who ever belonged to them. Even if Congress could make a reasonable determination that the Communist Party advocated doctrines of violence in the past and at the time of the legislation, it could not make a reasonable determination that it will always so advocate in the future. There is nothing more irrational than an assumption that institutions can not change. Yet the statute expels for membership in the Party or successor organizations which occurs after the legislation as well as before. Furthermore, there obviously was no basis for a reasonable judgment that at all times in the past the Party has advocated violent overthrow of the government. It is indisputable that during World War II the Communist Party, so

far from advocating overthrow of the government, zealously supported the government in its fight for survival.

Still other circumstances reveal that the legislation is not, as the government suggests, a considered reaction against promulgation of doctrines of force. The statute applies not only to the Communist Party; but also by name to the Communist Political Association. Yet the theory of the government in its conspiracy prosecutions of Communists under the Smith Act is that the Political Association advocated peaceable change and class collaboration and that a conspiracy of violent revolution had its inception with the dissolution of the Political Association in 1945 and the reconstitution of the Party. See, e.g., *Dennis v. United States*, 341 U.S. 494.

The justification for the statute offered by its sponsors was not that the proscribed organizations were so demonstrably dedicated to violence as to make proof of the circumstance an inconsequential detail. On the contrary, it was that "satisfactory proof of that position offers a formidable obstacle." S. Rep. 2230, 81st Cong., 2d Sess., p. 24.

Nor can the statute be justified by considerations of need. The legislation here involved did not supersede the provisions which expel aliens who ever belonged to any organization which advocates the violent overthrow of government or who themselves ever advocated such doctrine. The experience of the executive showed that this legislation adequately served the purpose of deporting aliens supposed to be undesirable by reason of past or present contact with revolutionary doctrine. On August 8, 1950, about a month before

enactment of the Internal Security Act, the President sent to Congress a message recommending the enactment of new legislation to protect the internal security. He expressly stated therein that existing laws "permit the Government to exclude or deport any alien from this country who may be dangerous to our internal security." H. Doc. 679, 81st Cong., 2d Sess., p. 4; 96 Cong. Rec. 12019. The President requested in his message that the immigration laws be amended to include reporting requirements for aliens ordered expelled but not yet deported (H. Doc. 679, p. 5; 96 Cong. Rec. 12020), but he saw no necessity for requesting an increase in the classes of deportable aliens. Later, the President vetoed the Internal Security Bill.

C. The Due Process Defects Can Not be Disregarded Because of Reasons Special to the Power of Alien Expulsion

Many, but not all, of the due process defects of the statute exist in the act sustained by *Harisiades v. Shaughnessy*, *supra*.¹⁴ That case, recognizing that the legislation there involved "stands out as an extreme application of the expulsion power" (at 588) and "inflicts severe and undoubted hardship on affected individuals" (at 590), nevertheless sustained the act against due process challenges similar in some respects to those advanced here. It did not, however, apply orthodox principles of substantive due process. In-

¹⁴ Unlike the legislation here involved, the *Harisiades* statute does not proscribe organizations by name and applies only to aliens who were members of an organization at a time when it advocated illicit doctrine. Like the present statute, that in *Harisiades* attributes guilt by association, does not allow for the possibly innocent nature of the alien's connection with the organization, including a possible absence of scienter, and applies retroactively.

stead, it treated expulsion as a governmental function which for reasons special to it is immune from due process objections. The same view underlies *Galvan*.

Two premises for this view were stated in *Harisiades*: (1) The alien has no "vested right" to retain his residence because, by rejecting American naturalization, he "perpetuates a dual status as an American inhabitant but foreign citizen" and "to protract this ambiguous status within the country is not his right but a matter of permission and tolerance" (at 585, 586-7). (2) Whether the power of expulsion is unreasonably and harshly exercised is a matter "largely immune from judicial inquiry or interference" because "any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government" (at 588-9).

Neither of these reasons is a valid defense to the due process objections which we have made. Due process prohibits an irrational and discriminatory deprivation of a privilege, as well as of a "vested right," as for example, in the case of the privilege of government employment. *Slochower v. Board of Higher Education*, 350 U.S. 551; *Wiemann v. Updegraff*, *supra*; *United Public Workers v. Mitchell*, 330 U.S. 75, 100. And as *Galvan* pointed out (at 530), substantive due process is a limitation upon all powers of Congress, even the war power. *Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U.S. 146, 155.

Moreover, any connection between the conduct of foreign relations and the expulsion of domiciled aliens is tenuous. The expulsion of such aliens does not in-

volve negotiations with foreign governments. Nor are those to be expelled defined in terms of their nationality. Those ordered expelled are citizens or subjects of other countries (or, in many instances, are stateless), but so are many defendants in criminal proceedings.

The common denominator of the two propositions advanced by *Harisiades* is that the alien is an unassimilated element who enjoys this country's hospitality without contributing anything in return and to whom, therefore, there is owed no obligation of fair dealing in the withdrawal of the hospitality. This view, however, was not shared by the Founders, who included aliens as well as citizens in the obligation of decent treatment expressed by the due process clause. They did so, it is fair to say, because they realized that America, a land settled by immigrants, still needed settlers from foreign countries to help build the country. *Harisiades*, ignoring this circumstance, gave a description of the alien which has no validity with respect to the vast majority of aliens in this country, who, like the petitioner, immigrated here for permanent residence and have made this country their home.

The immigrant is not a recipient of a gratuity and he does not remain a stranger. He came here at our invitation to help build the country, and he has contributed to our society and become part of it. The immigrants gave their children to populate our land. They brought us their cultures, their skills, and their ideals. They developed our fields, mines and factories.

These immigrant aliens do not fall within the description given in 1889 to Chinese laborers as people who "retained the habits and customs of their own country" and constituted a foreign "settlement within the State, without any interest in our country or its institutions." *Chae Chan Ping v. United States*, *supra*, at 596. These aliens' ties to their countries of origin are remote. Their mature years and energies have been expended here. They have married American citizens and begat American citizens. Whatever the international technicalities, sociologically they are a product of America and alien to the country of their birth. *Whom We Shall Welcome*, *supra*, 193-4, 200-2, 225-6; *Corsi*, *op. cit.*; *Maslow*, *op. cit.* p. 323-324; *Chafee*, *Free Speech in the United States* (1948) 238, 240. See e.g., *United States ex rel. Klonis v. Davis*, 13 F. 2d 630 at 630: "Whether the relator came here in arms or at the age of ten, he is as much our product as though his mother had borne him on American soil. He knows no other language, no other people, no other habits, than ours; he will be as much a stranger in Poland as any borne of ancestors who immigrated in the seventeenth century." As our Appendix shows, these circumstances are true of the aliens ordered deported on political grounds (Tables 1, 2, 3, 4, 9, 11).

To regard the expulsion of such immigrant aliens as an aspect of international relations, or to assume, as did *Harisiades* (at 585), that the countries of origin might protest against their deportation on the ground that this was mistreatment of their citizens, is unrealistic. Indeed, the difficulty is to persuade foreign countries to accept those we expel. See *Annual Report of Attorney General*, 1955, p. 408. As a Polish consul was

reported to have said before the war in explanation of Poland's refusal to admit a deportee of Polish origin: "A two-year old baby was sent to your country. You desire to send back in his place a fifty-two-year old criminal." Davie, *World Immigration* (1949) 412.

Harisiades manifests an attitude that the mistreated alien has only himself to blame because of a calculated refusal to accept naturalization (at 586-7). This is no basis for withholding from the alien the due process protection which the Constitution affords him. Moreover, the assumption is unsound. The fact is that, as in this case, many aliens have been prevented from obtaining citizenship by restrictive naturalization laws and, even more, by a restrictive administration of those laws. Still others erroneously believe that they are citizens. See Appendix, Table 10.

There is, therefore, no valid basis for depriving the alien of the protection of the due process clause, which was drawn to apply to alien and citizen alike. The alien, like the citizen, is entitled to decent treatment because he makes a contribution to our society and because he is a part of it. There is only one due process clause. The alien is concededly entitled to procedural due process. He is likewise entitled to substantive due process. And the principles of both kinds of due process are the same for both the citizen and the alien. Those principles condemn the legislation here.

IV. THE STATUTE IS A BILL OF ATTAINDER AND AN EX POST FACTO LAW

A. An Expulsion Statute Inflicts Punishment if It Is Not Based on Reasonable General Standards of Undesirability for Residence

"A bill of attainder is a legislative act which inflicts punishment without judicial trial." *Cummings v. Missouri, supra*, at 323. "... legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution." *United States v. Lovett*, 328 U.S. 303, 315; *Garner v. Board of Public Works*, 341 U.S. 716, 722. "An *ex post facto* law is one which imposes a punishment for an act which was not punishable at the time it was committed, or a punishment in addition to that then prescribed." *Burgess v. Salmon*, 7 Otto 381, 384.

These definitions are met by the statute here involved if it inflicts punishment. As we have seen, *Galvan* and *Harisiades* stated that "deportation is not punishment." In this respect, they relied on previous statements to that effect by the Court, while ignoring statements to the contrary. See *supra*, p. 29, fn. 7.

It is, however, not appropriate to inquire in the abstract and conceptualistically whether expulsion is punishment. The appropriate question is whether the particular expulsion provision inflicts punishment. The answer is that some do and others do not, depend-

ing on criteria which though elsewhere applied by the Court were ignored by *Galvan* and *Harisiades*.

In their uncritical reliance upon the formula that "deportation is not punishment", *Galvan* and *Harisiades* marked a sharp departure from the practice of this Court not to accept uncritically generalizations from earlier decisions without regard to the holdings of the Court. "Still less should this Court's interpretation of the Constitution be reduced to the status of mathematical formulas. It is the considerations that gave birth to the phrase, 'clear and present danger', not the phrase itself that are vital in our decision of questions involving liberties protected by the First Amendment." *American Communications Association v. Douds*, 339 U.S. 382, 394. "And it was Mr. Justice Holmes who admonished us that 'To rest upon a formula is a slumber, that, prolonged, means death' *Collected Legal Papers*, 306. Such a formula makes for mechanical jurisprudence." Frankfurter, J., concurring in *Kovacs v. Cooper*, 336 U.S. 77, 96.

The correct approach was stated in *Garner v. Board of Public Works*, 341 U.S. 716, 722: "Whether legislative action curtailing a privilege previously enjoyed amounts to punishment depends upon 'the circumstances attending and the causes of the deprivation.'" The proper inquiry, therefore, is whether the circumstances attending the particular expulsion statute here involved and the causes of the deprivation of the residence privilege under this statute constitute punishment.

As the quotation from *Garner* indicates, punishment is not necessarily a consequence of a criminal prose-

cution. It may consist of the civil deprivation of privileges. Thus punishment has been imposed by legislative acts which permitted the seizure of property (*Fletcher v. Peck*, 6 Cranch 87); excluded certain persons from various professions or employment (*Cummings v. Missouri*, 4 Wall. 277; *Ex Parte Garland*, 4 Wall. 333; *United States v. Lovett*, 328 U.S. 303; cf. *Garner v. Board of Public Works of Los Angeles*, *supra*); denied access to the courts (*Pierce v. Carskadon*, 16 Wall. 234); or exacted a tax (*Burgess v. Salmon*, *supra*).

Of course, these decisions do not mean that all acts seizing property, excluding persons from professions or employment, denying access to the courts, or exacting taxes are punishment. The Court did not find it necessary to overrule or limit *Cummings v. Missouri*, in holding that certain statutes that denied access to the professions were not punishment. *Hawker v. New York*, 170 U.S. 189; *Dent v. West Virginia*, 129 U.S. 114. On the contrary, it came to its result on the basis of an analysis of the particular statute there involved, a process which was neglected in *Galvan*. Similarly, although incarceration is normally considered to be punishment, it may not be if the statute provides for incarceration of the insane, persons with communicable diseases, or narcotic addicts. Cf. *Jacobson v. Massachusetts*, 197 U.S. 11, 29; *Buck v. Bell*, 274 U.S. 200.

It is clear, therefore, that the test of punishment is not the quality of the privilege which is being removed nor the severity of the consequences. The determinative factor is the nature of the depriving legislation. The criterion was indicated in *Garner v. Board of Public Works*, *supra*, at 722, which stated:

"We are unable to conclude that punishment is imposed by a general regulation which merely provides standards of qualification and eligibility for employment." Deprivation of a privilege is not a punishment only if it is based on general standards which establish reasonable tests of fitness to enjoy the privilege.

The test in operation is shown by *Dent v. West Virginia, supra*, which held that a legislature could exclude a physician from his profession by raising the educational requirements for medical practitioners. *Hawker v. New York, supra*, held that a legislature could exclude from medical practice physicians who had theretofore been convicted of felonies. In both cases, the Court held that the statutes did not inflict punishment, but instead merely established qualifications for the medical profession which were reasonably related to the proper practice of the profession. The Court distinguished *Cummings v. Missouri* and *Ex Parte Garland* on the grounds that the test oaths in those cases exacted requirements which had no reasonable relation to the proper practice of the profession involved.

In *Dent v. West Virginia*, the Court explained *Cummings* and *Garland* as follows (at 126):

"As many of the acts from which the parties were obliged to purge themselves by the oath had no relation to their fitness for the pursuits and professions designated, the court held that the oath was not required as a means of ascertaining whether the parties were qualified for those pursuits and professions, but was exacted because it was thought that the acts deserved punishment, and that there was no way of inflicting punishment except by depriving the parties of their offices and trusts."

The Court also remarked (at 128) that the oath in *Cummings v. Missouri* was "the exaction of an oath as to their past conduct, respecting matters which have no connection with such professions" as contrasted to the law being examined which "was intended to secure . . . skill and learning in the profession of medicine."

In the *Hawker* case, the Court made the same analysis. It stated (at 198) of *Cummings* and *Garland*;

"It was held that, as many of the matters provided for in these oaths had no relation to the fitness or qualification of the two parties, the one to follow the profession of a minister of the gospel and the other to act as an attorney and counselor, the oaths should be considered, not legitimate tests of qualifications, but in the nature of penalties for past offenses."

The Court had no trouble in deciding that this situation did not apply to legislation which resulted in barring from practice a physician who had been convicted of committing an abortion prior to the enactment of the legislation. Such a statute, the Court stated (at 199) was not an imposition of an additional penalty, but the prescribing of reasonable qualifications for those practicing the profession.

The distinction made by these cases between punishment and the establishment of standards of qualification is that in the latter situation the standards bear a reasonable relationship to insuring that the privilege is not misused. This test is readily applied to situations involving the privilege of aliens to continue to reside in this country. A deprivation of the residence privilege is not punishment if it represents the establishment of standards reasonably relevant to

ridding the country of undesirable aliens. But it is punishment to deprive a resident alien of his residence privilege if the deprivation is not based on any standards at all or on standards which have no reasonable relationship to undesirability.

Nothing more than this is meant by the decision in *Mahler v. Eby, supra*, which held that it was not punishment to expel an alien who, before enactment of the particular deportation statute, had been convicted of a felony against the security of the state. Such an expulsion statute was considered an establishment of reasonable qualifications for the privilege within the doctrine of *Hawker v. New York*, and in fact the Court in *Mahler* relied on *Hawker*. The Court stated in *Mahler* (at 39) that by the statute Congress

"was, in the exercise of its unquestioned right, only seeking to rid the country of persons who had shown by their careers that their continued presence here would not make for the safety or welfare of society."

Mahler does not mean that the Court would have sustained any deportation statute as valid, even if the statute had no rational relationship to alien undesirability, any more than *Hawker* stands for the proposition that a state could revoke the license of a medical practitioner on any ground, including grounds that had no rational relationship to the practice of medicine.

Similarly when *Bugajewitz v. Adams, supra*, sustained the deportation of an alien prostitute on the ground that "deportation was not punishment", it was not laying down a maxim for all deportation statutes in the future; it was holding no more than

that the particular deportation was a reasonable exercise of Congressional power "to order the deportation of aliens whose presence in the country it deems harmful" (at 591). See *supra*, pp. 33-35.

If, contrary to our argument, the test of punishment were the nature of the privilege being removed, then indeed nothing could be more anomalous than the generalization that "deportation is not punishment." The residence privilege is certainly more important to the individual than the ability to practice a particular profession in a particular state. One who permanently loses the residence privilege is deprived of liberty far more than one who is imprisoned for a short period. And although "Exclusion of a newly arrived alien by administrative fiat is not a serious hardship, for he simply returns to his old life and takes up the threads where he recently dropped them, . . . exclusion after long residence is another affair. Liberty itself, long-established associations, the home, are then at stake." Chafee, *Free Speech in the United States*, *supra*, at 199. "To aliens who have lived in the United States for many years, who have become integrated into its community life, and whose ties to their mother country have become remote and purely technical, a deportation order becomes the most severe and cruel penalty imaginable", *Whom Shall We Welcome*, *supra*, 193-194.

Moreover, the deportation procedure involves loss of liberty in respects other than the expulsion itself. The alien may be held in detention without bail during the deportation proceeding and for a six months period after the deportation order becomes final. See sec. 242(a)(c), Immigration and Nationality Act, 8 U. S. C. sec. 1252(a)(c); *Carlson v. Landon*, 342 U.S.

524; *United States v. Shaughnessy*, 117 F. Supp. 699. The detention frequently is in a common jail. See *United States v. Shaughnessy*, 112 F. Supp. 143. If deportation is ordered but cannot be accomplished, the alien may be subjected during the rest of his lifetime to onerous restrictions on his freedom, including limitations on those with whom he may associate, requirements on reporting to the Immigration and Naturalization Service, subjection to interrogation by the Service, restrictions on his right to travel or move his residence, as, for example, a prohibition that a New York resident not travel more than fifty miles from Times Square without written permission of the Service. Sec. 242(d) Immigration and Nationality Act, 8 U.S.C. sec. 1252(d); see *Nukk v. Shaughnessy*, 125 F. Supp. 498, 499, 509, ftms. 2 and 3; *Yanish v. Barber*, 97 L. Ed. 1637. If the alien does not make reasonable efforts to deport himself, he may be imprisoned for ten years. Sec. 242(e) Immigration and Nationality Act, 8 U.S.C. sec. 1252(e); *United States v. Spector*, 343 U.S. 169. He may now be deported to any country that will accept him, even if he was never previously connected with it. Sec. 243(a)(7), Immigration and Nationality Act, 8 U.S.C. sec. 1253(a)(7). It is perhaps needless to say that these various sanctions have been applied harshly to aliens ordered deported on political grounds. See Appendix, Tables 14, 15; *Yanish v. Barber*, *supra*.

The approach that deportation is not per se punishment has, therefore, become more and more difficult, as was recognized by Mr. Justice Jackson dissenting in *United States v. Spector*, *supra*, at 178:

“Administrative determinations of liability to deportation have been maintained as constitutional only by considering them to be exclusively civil in

nature, with no criminal consequences or connotations. That doctrine early adopted against sharp dissent has been adhered to with increasing logical difficulty as new causes for deportation, based not on illegal entry, but on conduct after admittance, have been added, and the period within which deportation proceedings may be instituted has been extended. By this Act a deportation order is made to carry potential criminal consequences."

Finally, the generalization that deportation is not punishment is an anachronism when applied to oust application of the bill of attainder clause. One of the familiar penalties imposed by Parliamentary bills of pains and penalties was banishment from the realm. So Parliament decreed the banishment of the Earl of Clarendon in 1667 (19 Car. II, c. 10) and of the Bishop of Rochester in 1722 (9 Geo. I, c. 17); see 46 Col. L. Rev. 849, 851. Indeed, the first known instances of the use of the bill of pains and penalties was the banishment of the two Spensers in 1322. 46 Col. L. Rev. 849, at 850, fn. 7.

Precedent and the realities combine, therefore, to require the abandonment of the conceptualistic and ritualistic formula that deportation is not punishment, and to substitute for it the correct approach that whether or not an expulsion statute inflicts punishment depends on whether it establishes general standards defining classes of persons whose continued residence in this country may reasonably be considered harmful.

B. The Deportation Provision Here Involved Inflicts Punishment Because It Does Not Establish Standards of Undesirability and Has No Reasonable Relevance to Expulsion of Undesirable Aliens

Under the test which we have described, the statute here involved is clearly punishment. For the statute establishes no standards at all of alien undesirability, a process which would necessarily involve a statement of culpable characteristics. All the statute does is to expel members of a named organization. This is not an establishment of standards or qualifications. It is merely an identification of the persons to be expelled. The situation is precisely as if Congress had listed certain aliens by name and provided that they should be deported. The situation is the same as the statute in the *Lovett* case, *supra*; which the Court later explained was penal because it "did not declare general and prospectively-operative standards of qualification and eligibility for public employment." *Garner v. Board of Public Works of Los Angeles, supra*, at 723. Furthermore, as our due process discussion has demonstrated, the statutory cause for expulsion—mere membership no matter how remote or innocent—is not reasonably connected to the objective of removing aliens whose continued residence is injurious to our society.

Since the expulsion statute here involved does inflict punishment, it is invalid as a bill of attainder and an *ex post facto* law. With respect to the latter feature, there is not present here the complication in *Harisiades* which pointed out that since 1920 Congress had maintained a standing admonition to aliens not to join organizations that advocate violent revolution (at 593). Cf. *Garner v. Board of Public Works of Los Angeles, supra*. Not until 1950, by this statute did

Congress admonish aliens not to join the Communist Party, and Congress did not earlier make a legislative finding that the Communist Party advocated violence. Indeed, when the issue of the nature of the Party's advocacy came before this Court in 1943 in *Schneiderman v. United States*, 320 U. S. 118, seven years after the cessation of the petitioner's membership, this Court held that the question was an open one.¹⁵

V. The Statute Violates the First Amendment.

The Court's opinion in *Galvan v. Press* did not consider the validity of the statute under the First Amendment. We submit that the statute also violates that provision of the Constitution, because it is a reprisal for the exercise of protected rights of assembly and expression.

In *Harisiades*, the Court held that the First Amendment did not protect an alien against expulsion for past membership in an organization which advocated the violent overthrow of the government. The Court based this holding on the pernicious nature of the ad-

¹⁵ The Court said at 148: "With commendable candor, the government admits the presence of sharply conflicting views on the issue of force and violence as a Party principle, and it also concedes that 'some Communist literature in respect of force and violence is susceptible of an interpretation more rhetorical than literal' ". See also Chafee, *Free Speech in the United States*, *supra*, at 481: "[The] question [of the nature of the Party advocacy] has puzzled men of high intelligence since the Deportation Act of 1918. United States Circuit Court Judges and Cabinet officers could not agree about it in 1920. We have had two decades since then in which to make up our minds, and the problem is still unsolved." See also for similar expressions *Strecker v. Kessler*, 95 F. 2d 976 (C.C.A. 5, 1938), *Kessler v. Strecker*, 307 U. S. 22; Note, 52 Yale L. J. 108, 128.

vocacy involved and on an asserted right of Congress to distinguish between the advocacy of peaceable change and the teaching of violence (at 592).

The statute here makes no such distinction. It simply proscribes for an alien an identified political affiliation, whether or not the group advocated violence. The statute in *Harisiades* required the government to prove that the organization advocated violence at the time of the alien's membership. The cases in *Harisiades* came to the Court with an unchallenged finding that the Party during the period of the alien's membership taught and advocated overthrow of the Government of the United States by force and violence (at 584). Under the statute here, no such finding is required, and evidence on the subject is irrelevant. This statute expels aliens for being members of an organization which did not during their period of membership advocate illicit doctrine. It expels the petitioner and other aliens solely because they engaged in peaceable assembly, expression and political activity.

Harisiades sustained an extensive and unjustifiable interference with aliens' rights of speech and association, since it sustained deportation not for anything the alien himself did or said, but solely because of the guilty advocacy of the organizations even if unknown to the alien. In this respect, *Harisiades* is inconsistent with *DeJonge v. Oregon*, 299 U. S. 353; *Garner v. Board of Public Works of Los Angeles*, *supra*, at 723-4; and *Wiemann v. Updegraff*, 344 U. S. 183. Furthermore, *Harisiades* wrongly disregarded the clear and present danger test. *American Communications Association v. Douds*, *supra*; *Dennis v. United States*, *supra*. *Harisiades* itself, therefore is an extreme case.

The statute here is an even greater invasion of the First Amendment than the provision sustained in *Harisiades*, and it cannot be justified even under that decision.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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OCTOBER TERM, 1956⁷

No. ~~24~~ 5

CHARLES ROWOLDT, *Petitioner,*

v.

J. D. PERFETTO, Acting Officer in Charge, Immigration and
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On Writ of Certiorari to the United States Court of Appeals
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APPENDIX TO BRIEF FOR PETITIONER

STUDY BASED ON 307 POLITICAL DEPORTATION CASES

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APPENDIX TO BRIEF FOR PETITIONER

STUDY BASED ON 307 POLITICAL DEPORTATION CASES

APPENDIX

Study Based on 307 Political Deportation Cases*

* This study was prepared under the supervision of Ann Fagan Ginger. It was compiled from questionnaires filled out by those facing deportation or their counsel and from reported administrative and judicial opinions and Department of Justice press releases. The source material is described more fully in a note following the tables.

Table 1. Present Ages of Deportees (as of Summer of 1956).

	Number	Cumulative Percentage
Over 65 years of age	74	25.
55 to 65 years of age	122	66.4
45 to 55 years of age	80	90.
35 to 45 years of age	17	99.3
Under 35 years of age	2	
Total for whom facts are known	295	

Table 2. Ages of Deportees at Time of Entry Into United States.

	Number	Cumulative Percentage
Less than 1 year old	8	2.6
1 to 5 years old	15	7.7
6 to 10 years old	34	19.1
11 to 15 years old	35	31.
16 to 20 years old	86	60.
21 to 30 years old	100	93.5
31 to 40 years old	16	99.7
Over 40 years old	1	
Total for whom facts are known	295	

Table 3. Length of Deportees' Residence in United States (as of Summer of 1956 or, if Already Expelled, as of Time of Expulsion).

	Number	Cumulative Percentage
More than 50 years	35	11.
41 to 50 years	143	60.
31 to 40 years	83	87.
21 to 30 years	20	94.
11 to 20 years	10	98.
Less than 10 years	6	
Total for whom facts are known	297	

Table 4. Graph Showing Length of Residence in U. S., Age at Entry, Present Age.

The graph following shows the length of residence of deportees included in this study. Each vertical column represents one deportee. The lower line shows the age at entry, the upper line the present age. The black area shows length of residence in the United States. The white area at bottom of graph shows length of residence in country of birth or elsewhere prior to entry into this country.

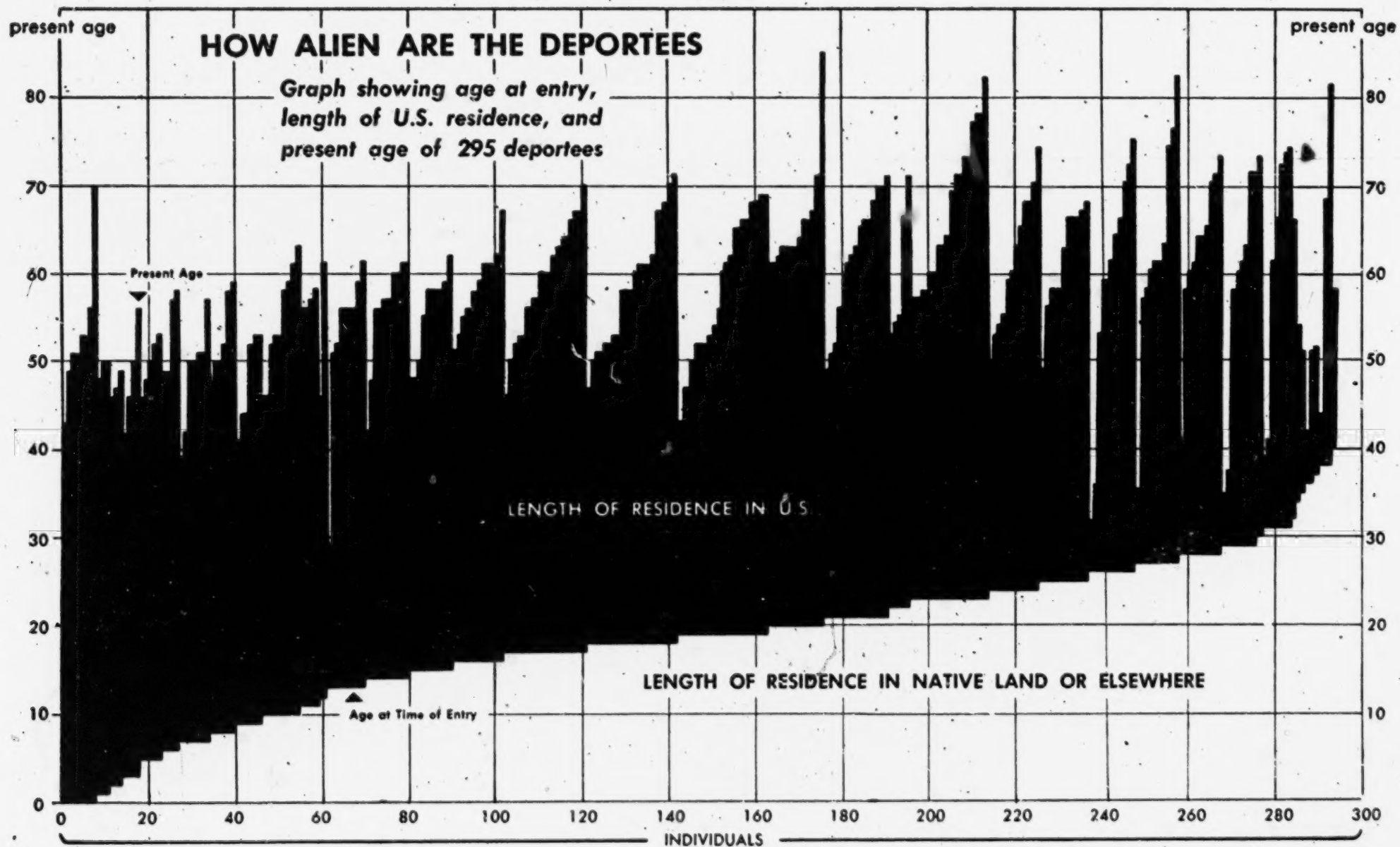


Table 5. Occupations.

Professionals		25
Dentist	1	
Nurse	1	
X-ray Technician	1	
Writers	12	
Educators	2	
Editors	2	
Architect	1	
Decorator	1	
Artists	2	
Draftsmen	2	
Small Businessmen		10
Truck Drivers		5
Seamen		3
Warehousemen		2
Miners		5
Farmers and Farm Workers		4
Foremen		3
Furriers		3
Tailors and Dressmakers		10
Garment Workers		12
Printing Trades		4
Building and Construction		24
Industrial Workers		26
Office Workers		16
Salesmen		8
Retail Establishments		4
Service Establishments		31
Domestic Workers		5
Housewives		35
Unskilled Workers		14
Unemployed		3
Retired		15

Total for whom occupations are known 267

Table 6. Women Deportees.

Information available as to 67 women deportees showed the following:

Present Age

Over 70 years of age	6
60 to 70 years old	10
50 to 60 years old	34
40 to 50 years old	14
35 to 40 years old	1
Age not known	2

Age at Entry

Less than 1 year old	2
1 to 10 years old	16
10 to 20 years old	33
20 to 30 years old	16

Length of Residence

More than 50 years	8
40 to 50 years	30
30 to 40 years	20
20 to 30 years	4
10 to 20 years	2
Length of residence not known	3

Family Status

Married	57
Citizen children	44
Citizen grandchildren	33
No close relatives in country of birth	51

Table 7. State of Present Residence.

California	78
Colorado	4
Florida	1
Illinois	13
Indiana	1
Louisiana	1
Massachusetts	1
Michigan	52
Minnesota	4
Missouri	3
New Hampshire	1
New Jersey	4
New York	36
Ohio	9
Oregon	8
Pennsylvania	11
Texas	1
Utah	1
Washington	10
West Virginia	3
Wisconsin	4
Hawaii	1
Total for whom state of present residence is known	247

Table 8. War-Time Service.

Served in United States armed forces during First or Second World War	14
Did not serve	127
Total for whom facts are known	141
Performed civilian war-time service during Second World War	45
Did not perform civilian war-time service	109
Total for whom facts are known	154
Had sons or daughters 18 or over who served in United States armed forces during Second World War or Korean War	45

Had sons or daughters 18 or over who did not serve	42
Total for whom facts are known	87

Table 9. Family Status.

Are or have been married	225
Divorced or separated	22
Never married	61
Total for whom facts are known	286

Of 225 now or previously married,

Married to United States citizens	127
Have citizen children	169
Have citizen grandchildren	92

This study includes 24 persons (12 couples) who face deportation and whose spouses also face deportation. In the cases of 3 couples, husband and wife are deportable to different countries.

Table 10. Attempts to Achieve United States Citizenship.

Tried to become citizens before initiation of deportation proceedings	173
Had application for citizenship pending at time of deportation arrest	78
Could not apply for citizenship because of nationality	1
Had been citizens but lost citizenship by denaturalization, marriage to non-citizen, etc.	9
Before deportation proceedings believed they were citizens by birth, marriage or derivation	5
Made no effort to achieve citizenship	66
Total for whom facts are known	254

Table 11. Ties to Native Country.**A. Relatives.**

Having no close relatives (children, spouses, parents, siblings) living in country of birth	173
Having one or more close relatives living in country of birth	75

Child	2
Wife	2
Mother	5
Father	4
Brother or sister	69

Total for whom facts are known	248
--------------------------------	-----

B. Ability to Speak and Read Language of Country of Birth.

Unable to speak and read language	62
Able to speak and read language	170
Able to speak or read language, but not both	21

Total for whom facts are known	253
--------------------------------	-----

C. Whether Place of Birth Has Become Part of Different Country Than It Was At Time of Birth.

No	149
Yes	105

Total for whom facts are known	254
--------------------------------	-----

Table 12. Labor Union Membership.

Are or were members of labor unions in the United States	185
Were not members of labor unions in United States	53

Total for whom facts are known	238
--------------------------------	-----

Table 13. Time of Initiation of Deportation Proceeding.

Before 1920	4
1920 to 1929	2
1930 to 1939	24
1940 to 1944	8
1945 to 1949	50
1950 to 1956	164
Total for whom facts are known	252

Table 14. Period of Detention Immediately Following Deportation Arrest.

Held less than 1 day	133
Held more than 1 day awaiting bail or because bail was denied	96
Held up to one week	41
Held one week to one month	24
Held one month to one year	29
Held more than one year	2
Total for whom facts are known	229

In 49 of these cases, court action was required in order to secure release on bail pending disposition of the deportation proceedings.

In 100 of these cases, the deportees after once having been released were again detained during the deportation proceeding, 14 of them being rearrested twice or oftener.

Table 15. Amount of Bail Set in Deportation Proceeding.

Amount	Number	Percent
Over \$5,000	2	1.
\$4,000 to \$5,000	51	21.
\$2,000 to \$3,500	81	32.
\$1,000 to \$1,500	61	23.
\$500	29	11.
Held without Bail	23	10.
Released without Bail on own recognizance, parole, or conditional parole	9	3.
Total for whom facts are known	256	

Table 16. Charges in Deportation Proceeding.

Total number for whom information was available	307
Number charged with past or present membership in Communist Party of United States*	290
Number in which other charges were pressed	18**
Personal belief in and advocacy of violent overthrow of government	2
Anarchist beliefs	1
Advocacy of "world communism"	1
Affiliation with Communist Party of United States	4
Affiliation with Communist Party of United States through membership in International Workers Order	3
Membership in Young Communist League	1
Membership in Nazi Party	1
Membership in foreign Communist Party prior to entry into United States	5

* Including cases prior to Internal Security Act in which charge of Communist Party membership was stated as membership in an organization advocating violent overthrow of government.

** In one of these, the case of Peter Harisiades, the government pressed charges of both Communist Party membership and personal belief in and advocacy of violent overthrow. The Board of Immigration Appeals ruled that the charges of personal belief and advocacy were not sustained (File A-5 300-756). In no other case charging Communist Party membership did the government attempt to prove personal belief in or advocacy of violent revolution.

Table 17. Communist Party Membership* Ended How Long Before Date of Deportation Arrest Under 1940, 1950 and 1952 Acts.

	Number	Percent	Cumulative Percent
Membership ended over 30 yrs. before arrest	1	.6	.6
Membership ended 21-25 yrs. before arrest	8	5.	5.6
Membership ended 16-20 yrs. before arrest	45	27.	32.6
Membership ended 11-15 yrs. before arrest	51	30.	62.6
Membership ended 6-10 yrs. before arrest	19	11.	73.6
Membership ended 1-5 yrs. before arrest	24	14.	87.6
Members at time of arrest	20	12.	
Total for whom facts are known	168	100.	

* As claimed by Government.

Table 18. Duration of Communist Party Membership of Persons Arrested under 1940, 1950 and 1952 Acts.*

Duration	Number	Percent
Less than 1 year	8	5.
1 month	1	
2 months	1	
3 months	3	
4 months	1	
5 months	1	
6 months	1	
1 year	15	10.
2 years	47	31.
3 to 5 years	26	17.
6 to 10 years	29	19.
11 to 15 years	14	9.
16 to 20 years	8	5.
21 to 25 years	5	3.
26 to 30 years	2	1.
Total for whom facts are known	154	100.

* As claimed by Government.

Table 19. Disposition of 307 Cases Studied.

	Number	Percent
Cases Ended Without Deportation		
Warrants cancelled after deportation hearing	1	.003
Warrants cancelled by order of Board of Immigration Appeals	9	3.
Warrants cancelled after Court action	8	3.
Deportees died during proceedings	6	2.
	24	8.003
Cases Ended by Departure from U. S.		
Deported	27	8.
Accepted voluntary departure	9	3.
	36	11.
Pending Cases		
On supervisory parole*	157	49.
Pending before the Service	17	6.
Pending in Federal courts	45	16.
	219	71.
Present Status Unknown	28	9.
Totals	307	100.

* These have had a final order of deportation outstanding against them for six months or more, but cannot be deported because there is no country to which they can be sent. They are subject to the supervisory parole provisions of section 242(d) of the Immigration and Nationality Act, 8 U. S. C. 1252(d).

SCOPE AND SOURCES

This study is limited to cases of persons arrested for expulsion on political charges after passage of the Internal Security Act plus persons previously arrested on such charges in whose cases some government action was taken after the Act. The study includes all such cases which

could be ascertained and for which the information sought could be obtained.

The government does not publish material of the kind here surveyed on political deportation cases as a group, and the files of individual deportation cases are not open for public inspection. It was necessary, therefore, to utilize other sources. The names of more than 300 cases to be studied were compiled from correspondence with attorneys known to practice in the field and from other private sources. Questionnaires were sent to the deportees and their counsel in those cases, and 250 of them were returned with answers.

This material was supplemented and (where the same cases were involved) checked by information appearing in the following: press releases issued by the Department of Justice for 1953 to 1955, inclusive, 26 of which contained relevant information on specific cases; opinions reported in Immigration and Naturalization Decisions for 1950 to 1954 inclusive (24 of such opinions being used); opinions reported in the Federal Reporter from 1950 on (44 of such opinions being used).*

For cases in which information was obtained solely from the press releases and reported opinions, the questionnaires were completed to the extent possible by those making the study. In a few cases there were discrepancies between a deportee's response to a questionnaire and information on his case appearing in a reported opinion. In these, the information from the latter source was utilized.

It is estimated that the 307 cases studied in this Appendix comprise well over a third of all political deportation cases which arose since 1950 or were then pending. While government figures are not absolutely clear even on the number of deportation arrests made on

* We have furnished to the Solicitor General a list showing the cases studied and the source material used for each case.

political grounds, they show that in 1955 there were "744 aliens who were under subversive charges or who had subversive backgrounds."* The official figures also show that between 1950 and 1955, 183 such persons were deported, 23 accepted voluntary departure, and 229 were undeportable;** and that in 1955, 33 were arrested***—making a total of 468 cases.

This study probably includes a majority of cases now pending, since it includes only 27 cases in which deportation was actually carried out, and 9 in which there was voluntary departure, as compared with the official 1950-1955 totals of 183 deported and 23 voluntary departures.

* 1954 Annual Report of Immigration and Naturalization Service, p. 39.

** Totals for 1950 through 1954 appear in 1954 Annual Report of Immigration and Naturalization Service, Table 33. The figures for 1955 appear in 1955 Annual Report of the Attorney General, pp. 405, 408.

*** 1955 Annual Report of the Attorney General, p. 403.

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REPLY BRIEF FOR PETITIONER

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Supreme Court of the United States

OCTOBER TERM, 1956 ⁷

No. ~~2~~ 5

*CHARLES ROWOLDT, *Petitioner,*

v.

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On Writ of Certiorari to the United States Court of Appeals
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REPLY BRIEF FOR PETITIONER

I. Petitioner Was Only a Nominal Member and Hence Not Deportable

A. The government recognizes that *Galvan* established a caveat as to the nature of deportable membership under the statute involved here (Govt. Br. 15). It deprives that caveat of any significance, however, by equating this Court's concept of "nominal" membership with unknowing or unconscious membership (Govt. Br. 33). *Galvan* plainly establishes, however, that one may have been a conscious member of the

Communist Party and still have had a relationship with the Party so "nominal" as not to come within the Act (at 528-9). Moreover, the government throughout its brief ignores the distinction made in *Galvan* between knowledge of unlawful advocacy, which *Galvan* held was not a prerequisite of deportability, and knowledge of the nature of the Communist Party as a distinct and active political organization, which it held was a prerequisite (at 528).

B. Even within its own framework the government finds it necessary to distort the record in order to exclude Rowoldt's membership from the nominal category. As we pointed out in our main brief (p. 22), the sole evidence against the petitioner was his voluntary statement made in January, 1947. The government urges that the statement should be taken not as made, but as argumentatively interpreted.

Thus, the petitioner's assertion that he joined the Communist Party because "it seemed to me that it came hand in hand—the Communist Party and the fight for bread" (R. 26), is translated by the government to mean that "he joined, not out of his own economic necessity, but to participate in its activities" (Govt. Br. 17), and because he believed the "Party was the appropriate channel through which to seek social reforms and through which to secure ultimate economic benefits to society generally" (Govt. Br. 20). Petitioner's statement that "even in the few Communist meetings I attended, nothing was ever said about overthrowing anything. All they talked about was fighting for their daily needs. That is why we never thought much of joining those parties in those days" (R. 31), is translated into the following: Petitioner "did actively par-

ticipate in the councils of the Party" (Govt. Br. 17) and "attended party meetings where party policy in regard to the economic situation was discussed" (Govt. Br. 18). Petitioner's statement that he was "kind of a salesman" in the Communist Party bookstore "for a while" (R. 28-29) means to the government that petitioner "was chosen by the Party to operate its bookstore in Minneapolis, Minnesota" (Govt. Br. 18). The petitioner's rambling and discursive discourse on the subject of Communism which discloses a rather incoherent and certainly unorthodox approach to the subject reveals to the government an "acquaintance with the Party classics (apparently relating back to the period of his membership)" (Govt. Br. 18, 28-29).¹ And the statement of the petitioner that "all they [the Communists] talked about was fighting for the daily needs" (R. 31) becomes to the government an admission that he was "aware of the immediate political and economic objectives of the Party in meeting the depression problems at hand" (Govt. Br. 29).

C. The government's brief is a vivid demonstration of the need at a minimum to remand this case to the Service for determination of the issue of whether petitioner was or was not a nominal member. The government argues that the case should not be remanded since there is no dispute as to the basic facts (Govt. Br. 35). It is true that the text of petitioner's voluntary statement, which is the sole evidence against him, is undisputed. But the inferences to be drawn from the state-

¹ Although the government makes this point twice in its brief, it does not indicate in either instance, why this is apparent. It is certainly not apparent from petitioner's statement.

ment are certainly at issue. The government in fact devotes a major portion of its brief in arguing the inferences to be drawn.

The arguments and considerations now advanced by the government, are being made for the first time and were never considered or evaluated by the Service. Petitioner is entitled to the considered judgment of the Service on the facts and the inferences to be drawn, not to an argumentative assertion in this Court as to what the Service might have done if it had considered the question. The Service found only that the petitioner "has been a member of the Communist Party" and that therefore his "deportation from the United States is mandatory." (R. 11). It gave no consideration to whether that membership was nominal or not. And the government, as we have seen, even now has an erroneous concept of what nominal membership means. The Service could not have resolved the issue either on the basis of the considerations now advanced by the government or on a correct basis, since it did not consider the question at all.

The government's contention that this Court should nevertheless determine the issue of nominal membership as a court of first instance, is against settled principles. In *National Labor Rel. Bd. v. Virginia Elec. & Power Co.*, 314 U. S. 469, 476, the Court said:

"The command of § 10(e) of the [National Labor Relations] Act that 'the findings of the Board as to the facts, if supported by evidence, shall be conclusive' precludes an independent consideration of the facts. Bearing this in mind we must ever guard against allowing our views to be substituted for those of the agency which Congress has created to administer the Act. But here

the Board's conclusion that the Independent was a Company dominated union seems based heavily upon findings which are not free from ambiguity and doubt. We believe that the Board, and not this Court, should undertake the task of clarification."

See also *Securities and Exchange Comm. v. Chenery Corp.*, 319 U. S. 80:

"If an order is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative judgment. For purposes of affirming no less than reversing its orders, an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency." (at 88.)

"But the difficulty remains that the considerations urged here in support of the Commission's order were not those upon which its action was based." (at 92.)

The government argues further that "it cannot be assumed . . . that the immigration authorities . . . would have failed to consider his [the petitioner's] claim to 'nominal' membership had it been fairly presented" (Govt. Br. 36). But the controlling fact is that the Service did not consider the problem, not why it did not. If, as this Court held in *Galvan*, the petitioner is deportable under the statute only if his membership was more than nominal, then the Service was not justified in issuing the deportation order absent the requisite finding. The fact that the petitioner and his counsel may have been, like the Service, deficient in understanding the requirements for a valid order of

deportation does not remedy the failure of the Service to make the necessary finding.

II. The Unconstitutionality of the Statute

The government argues that we misread the holding in *Galvan* as upholding the power of Congress to expel aliens for causes which have no rational relationship to their desirability as residents. It apparently agrees with our contention (Br. p. 42-48), that deportation statutes should be upheld by this Court only if they constitute a reasonable classification of currently undesirable aliens (See Govt. Br. p. 41). But if this be so, then clearly the Court should now re-examine the statute on that test; for manifestly it did not do so in *Galvan*. On the contrary, the Court intimated that by that test the statute could not survive. Thus the Court said at 530: "If due process bars Congress from enactments that shock the sense of fair play—which is the essence of due process—one is entitled to ask whether it is not beyond the power of Congress to deport an alien who was duped into joining the Communist Party, particularly when his conduct antedated the enactment of the legislation under which his deportation is sought." Yet the Court neither asked nor answered this question because in its view the "state was not clean" and the Due Process Clause *did not* "qualif[y] the scope of political discretion heretofore recognized as belonging to Congress in regulating the entry and deportation of aliens" (at p. 531).

Accordingly, if we and the government are right, and the due process clause does qualify the deportation power so as to require a reasonable classification of undesirable aliens, *Galvan* is wrong and must be abandoned. We are satisfied that, as demonstrated in

our brief, the statute tested under the standard which the government now accepts is clearly unconstitutional. Furthermore, the statute, once it is tested against orthodox constitutional standards, is also, as demonstrated in our brief, in conflict with the First Amendment and the ex post facto and bill of attainder clauses.²

Finally, if the statute is to be tested against the standard of a reasonable classification of undesirable aliens, then it is clearly invalid as applied to the petitioner here. It is irrational to conclude from the fact that the petitioner twenty years ago was active in a movement for relief of the unemployed that he is therefore an undesirable resident today.

Respectfully submitted,

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² The government suggests that this Court should not reconsider *Galvan* because it was a "comprehensive" opinion (Br. p. 39). Whatever else may be said of *Galvan's* treatment of the constitutional issues involved, it certainly cannot be characterized as "comprehensive."

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PETITIONER'S ~~REPLY~~ ^{REPLY} BRIEF TO RESPONDENT'S
SUPPLEMENTAL BRIEF ON REARGUMENT

IN THE
Supreme Court of the United States

OCTOBER TERM, 1957

No. 5

CHARLES ROWOLDT, *Petitioner*,

v.

J. D. PERFETTO, Acting Officer in Charge, Immigration
and Naturalization Service, Department of Jus-
tice, St. Paul, Minnesota.

On Writ of Certiorari to the United States Court of Appeals
for the Eighth Circuit

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IN THE
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On Writ of Certiorari to the United States Court of Appeals
for the Eighth Circuit

**PETITIONER'S REPLY BRIEF TO RESPONDENT'S
SUPPLEMENTAL BRIEF ON REARGUMENT**

I. Nominal Membership

The respondent argues at length (Supp. Br. 7-23) that *Galvan* was correct in interpreting the statute as not requiring knowledge of unlawful advocacy as a prerequisite for deportability. We did not dispute this aspect of the *Galvan* decision; on the contrary we stressed in our main brief (pp. 43, 64) that this was one of the features of the statute that rendered it unconstitutional. The government's treatment of the

issue, however, ignores the distinction made in *Galvan* between knowledge of unlawful advocacy, which *Galvan* held was not a prerequisite of deportability, and knowledge of the nature of the Communist Party as a distinct and active political organization, which it held was a prerequisite (at 528).

As indicated in *Galvan*, there is an area of membership, which is only nominal and does not fall within the scope of the statute. Although knowledge of unlawful advocacy is not necessary for this purpose, mere conscious or voluntary membership is not enough. One's membership may be conscious and voluntary, but still nominal.

The most illuminating gloss on the statute appears in the congressional debate on the 1951 clarifying amendment (see *Galvan* at 527.) Senator Ferguson, who offered the amendment which was finally adopted by the Senate, explained it as follows:

"... the amendment would exclude all those who were Communists by conviction, what we might call mentally Communists. But it would not exclude those who really, in effect, never have been what I call mentally Communist—those whose Communist affiliation was nominal or involuntary." (97 Cong. Rec. 2368.)

* * * * *

"When we change it here today we are not changing it as to people who were Fascists, Nazis, Communists, or totalitarians by virtue of their convictions and what I have referred to as their mental processes." We are changing it only as to those persons who never were mentally or psychologically Fascists, Nazis, Communists, or totalitarians of any stripe or any color." (97 Cong. Rec. 2387.)

As noted in *Galvan*, Congress considered that the most authoritative source for the meaning of the term membership as used in the statute could be found in the District Court decision in *Colyer v. Skeffington*, 265 Fed. 17. In addition to the portions of that decision quoted in *Galvan*, it is important to note that the court there set aside deportation orders against persons meeting the following description:

"Social, educational purposes, and race sympathy, rather than political agitation, constituted the controlling motive with a large share of them [i.e., aliens ordered deported on grounds of membership]. They joined the local Russian or Polish or Lithuanian Socialist or Communist club, just as citizens join neighborhood clubs, social or religious, or civic, or fraternal." (At 50.)

The court also stated in *Colyer* (at 72),

"Such a membership must be a real membership."

In *Colyer*, the Court also set aside deportation orders as being based on insufficient proof, where the evidence showed only that the alien had paid dues to the Communist Party for three months (see at p. 75), and in another case where the alien had joined the Communist Party because it offered him an opportunity to learn to read, write, and do arithmetic. This alien, according to the Court, had no interest in politics and so fell outside the scope of the statute (see at 74).

As we have shown in our main brief (pp. 21-23), under these standards, petitioner's membership in the Communist Party was of a nominal character.

II. The Act's Violation of Substantive Due Process

Schware v. Board of Bar Examiners, 353 U.S. 232, decided after we submitted our original brief, confirms our position that the due process clause prohibits deprivation of an important privilege because of the bare fact of past membership in the Communist Party. *Schware* holds that such membership does not without more justify an inference of presently bad character and is not a rational basis for determining that an individual is unfit to practice law. In addition, the government's extended, though unnecessary, demonstration that the deportation statute does not require scienter, supports our view that the statute collides with *Wieman v. Updegraff*, 344 U.S. 183, which holds that due process prohibits exclusion from governmental employment on account of organizational membership unaccompanied by personal knowledge of the group's claimed pernicious character.

Accordingly, if the privilege of residence is protected by the same due process principles as such less vital privileges as government employment and access to the professions, an alien may not constitutionally be expelled for reasons which have no rational relation to his desirability as a continued resident. Among such invalid reasons is past membership regardless of circumstances in the Communist Party. The government flies in the face of *Schware* and *Wieman* when it argues that the deportation statute represents a reasonable determination of an alien's undesirability because the Communist Party is, has been at every single moment in the past, and will always be, a bad organization.

The government contends, however, that exercise of the expulsion power, unlike the other powers of gov-

ernment, is not subject to judicial review because it is connected with foreign affairs.¹ The argument is made that it is a political question whether the United States should eliminate a possible "source of diplomatic complaint . . . by expelling the alien" (Supp. Br. 28.)

But this claimed political question is not involved here, because the particular legislation is not an exercise of any power to eliminate diplomatic complaints. Rather it is an exercise of the power to oust aliens considered to be presently undesirable residents for reasons having nothing to do with international responsibilities toward aliens. The considerations which led Congress to enact the statute are elaborately set out in the government's Supplemental Brief (pp. 40-66), and they amply demonstrate that the thought that aliens covered by the statute might be a source of diplomatic complaint played no part in that decision. The thesis there expounded is that an alien who ever was a member of the Communist Party regardless of the circumstances and the period and duration of membership, has abused our hospitality and is susceptible to reinfection by radical ideas. This is about the same view that was rejected in *Schwabe* as being "wholly unwarranted" (Frankfurter, J. concurring at 249).

¹ There is no substance to the government's other contention (Supp. Br. 39) that if deportation statutes are to be tested by due process standards, the degree of rationality which they must meet is much lower than in other cases. This Court does not set aside a statute as violative of due process unless it is based upon "a wholly arbitrary standard or on a consideration that offends the dictates of reason." (Frankfurter, J., concurring in *Schwabe* at 249). Surely there is no room for "lower" or "higher" standards in determining whether a statute is "wholly arbitrary."

It is important to remember that though the government throughout disingenuously assimilates expulsion and exclusion, the statute here involved is expulsion legislation. Moreover, the expulsion is decreed for conduct which occurred in this country. Nor does it draw any distinction along nationality lines. Accordingly, the statute has no significant connection with eliminating possible diplomatic complaints or other aspects of our foreign relations. If Congress had been acting to remove the source of foreign complaints concerning the treatment of aliens, it would have required the deportation of all aliens, or aliens of particular nationality, or aliens whose conduct was genuinely related to the creation of international incidents.

There is no more reason, therefore, why this legislative determination of who constitutes undesirable residents should be insulated from judicial review than a determination of who constitutes undesirable government employees. Indeed, the latter determination is more directly connected with the administration of governmental affairs and should, if anything, have more leeway than the former.

Respectfully submitted,

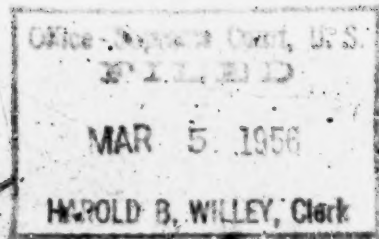
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No. ~~676~~ *3*

In the Supreme Court of the United States

OCTOBER TERM, 1955

CHARLES ROWOLDT, PETITIONER

v.

J. D. PERFETTO, Acting Officer in Charge, Immigration and Naturalization Service, Department of Justice, St. Paul, Minnesota

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

SIMON E. SOBELOFF,
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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 676

CHARLES ROWOLDT, PETITIONER

v.

J. D. PERFETTO, Acting Officer in Charge, Immigration and Naturalization Service, Department of Justice, St. Paul, Minnesota.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1a-4a) is reported at 228 F. 2d 109. The opinion of the District Court appears at pages 196-199 of the record.

JURISDICTION

The judgment of the Court of Appeals was entered December 22, 1955 (Pet. App. 5a). The petition for a writ of certiorari was filed February 9,

1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED

Whether the order for the deportation of petitioner as one who, after entry, had been a member of the Communist Party is based on evidence showing more than nominal membership in the party.

STATUTE INVOLVED

Section 22 of the Internal Security Act of 1950, 64 Stat. 1006, 1008, provided in part as follows:

That any alien who is a member of any one of the following classes shall be excluded from admission into the United States:

* * * * *

(2) Aliens who, at any time, shall be or shall have been members of any of the following classes:

* * * * *

(C) Aliens who are members of or affiliated with (i) the Communist Party of the United States * * *

Section 4 under the aforesaid Section 22 provided in part:

(a) Any alien who was at the time of entering the United States, or has been at any time thereafter, * * * a member of any one of the classes of aliens enumerated in section 1(2) of this Act, shall, upon the warrant of

the Attorney General, be taken into custody and deported in the manner provided in the Immigration Act of February 5, 1917. The provisions of this section shall be applicable to the classes of aliens mentioned in this Act, irrespective of the time of their entry into the United States.¹

STATEMENT

Petitioner seeks review of the judgment of the Court of Appeals affirming the dismissal by the District Court for Minnesota of his petition for a writ of habeas corpus in which he attacked the validity of an order directing his deportation on the ground that he is an alien who, after entry, had been a member of the Communist Party.

The immigration file, which was annexed to respondent's return (R. 15-16) and is part of the record, shows that petitioner, who was born in Germany in 1883, entered the United States for permanent residence in 1914 and last entered the United States in 1924 (R. 57, 104). In 1936, he was ordered deported on the ground that he was a member of an organization (the Communist Party) which advocated the overthrow of the government by force and violence, but the order was not executed. The proceedings were cancelled in 1942 on the authority of *Kessler v. Strecker*, 307 U. S. 22

¹ These provisions were repealed by Section 403(a)(16) of the Immigration and Nationality Act of June 27, 1952 (66 Stat. 163, 279). The 1952 Act recodified and reenacted these provisions without material change. See Section 241(a)(6) (C), 66 Stat. 204, 8 U.S.C. 1251(a)(6)(C).

for the reason that petitioner was not shown to have been a member of the Party at the time of the hearing (see R. 22-23).

In 1948, after past membership in an organization advocating the violent overthrow of the government, had been made a ground of deportation by the Act of June 28, 1940 (54 Stat. 673), petitioner was served with a warrant charging him with having been affiliated with such an organization (R. 52-54, 95). Hearings under the warrant were invalidated by reason of the decision of this Court in *Wong Yang Sung v. McGrath*, 339 U. S. 33, that deportation hearings must be conducted in accordance with the Administrative Procedure Act (R. 46). After Congress, by a rider to the Appropriation Act of 1951 (64 Stat. 1044, 1048) exempted deportation hearings from the Administrative Procedure Act, a new hearing was commenced on February 16, 1951. On that date, an additional charge was lodged against petitioner under Section 22 of the Internal Security Act of 1950 (*supra*, p. 2) charging him with having been, after entry, a member of the Communist Party of the United States (R. 46, 75). The hearing was then adjourned to March 28, 1951, to allow petitioner time to meet the additional charge (R. 75). At the conclusion of the adjourned hearing, the hearing officer found petitioner deportable as an alien who had been, after entry, a member of the Communist Party (R. 46-49). His recommendation was approved by the Assistant Commissioner (R. 36-40) and an appeal to the Board of Immigration Appeals was dismissed, the Board concluding that the evidence

supported the finding of membership in the Communist Party (R. 22-23).

The evidence of petitioner's membership rests for the most part on sworn testimony by petitioner himself before an immigration inspector on January 10, 1947. After the inspector had warned petitioner that anything he said might be used against him and petitioner had made statements, not under oath, to the effect that he wanted to return to Germany and for that reason had not fought very hard on his petition for naturalization (R. 100-102), petitioner agreed to give testimony under oath. After being sworn, he stated that he joined both the Communist Party and the Workers Alliance in the spring or early summer of 1935. He testified that there were no dues books in the Party, but that someone collected dues (R. 105). The Workers Alliance had dues books (R. 105). Petitioner dropped out of the Communist Party but remained in the Workers Alliance when he was arrested in the first deportation proceedings at the end of 1935 (R. 105). He was on the executive board of the Workers Alliance (R. 105). When asked whether he was an active worker in the Communist Party, he replied "The only active work I did was running the bookstore for a while" (R. 107). The following ensued (R. 107):

Q. Did you own the bookstore?

A. No, I didn't get a penny there.

Q. What was the arrangement there?

A. I was kind of a salesman in there, but the Communist Party ran it.

Q. You secured this employment through your membership in the Communist Party?

A. Yes.

Q. Was this store an official outlet for communist literature?

A. Yes.

In answer to a question as to whether he had joined the Communist Party because of dissatisfaction in living in a democracy, (R. 108) petitioner gave the answers quoted at page 4 of his petition to the effect that his joining was "a matter of having no jobs at that time"; that it was necessary to fight for food and shelter (R. 108-109).

An order directing petitioner's deportation was issued on April 16, 1952 (R. 120). In March, 1955, after petitioner had been taken into custody for immediate deportation to Germany, the petition for habeas corpus was filed (R. 3-5).²

In dismissing the petition, the District Court held that the evidence produced at the hearing sustained petitioner's deportability under the definition of membership laid down by this Court in *Galvan v. Press*, 347 U. S. 522 (R. 198).³ The Court of Appeals, in affirming the order of the District

² After the original petition for habeas corpus was filed, a supplemental petition alleged, as an additional reason for a stay of deportation, that petitioner had applied to the Board of Immigration Appeals for vacation of the order of deportation in order to enable him to apply for suspension of deportation (R. 7-12). That motion, we are informed, was denied by the Board of Immigration Appeals in June, 1955, after the judgment of the district court in this proceeding.

³ The original petition for habeas corpus challenged generally the constitutionality of the order of deportation and the propriety of the procedures (R. 3-5). After the hearing

Court, held that there was "an adequate evidentiary basis for the finding that Rowoldt was a member of the Communist Party in 1935" and that like Galvan (347 U. S. at p. 529) "the record does not show a relationship to the party so nominal as not to make him a 'member' within the terms of the Act." (Pet. App. 4a).

ARGUMENT

As both courts below held (see *supra*), the evidence at the deportation hearing showed that petitioner's membership in the Communist Party in 1935 was not, as petitioner claims (Pet. 5-10), the type of nominal membership to which this Court adverted in its opinion in *Galvan v. Press*, 347 U. S. 522, 527. Rather, like *Galvan*, the record shows that petitioner "joined the Party, aware that he was joining an organization known as the Communist Party which operates as a distinct and active political organization, and that he did so of his own free will" (347 U. S. at p. 528). Petitioner was aware of the difference between the Workers Alliance and the Communist Party for he himself explained the different methods of paying dues in each organization, and further stated that he dropped out of the Party at the time of his first arrest for deportation at the end of 1935; but continued to be active in the Alliance (R. 105). While he testified that his motive in joining the Party was not to overthrow the government but to fight for jobs and shelter (R. 108), this was a statement of

on an order to show cause why the writ should not issue, the District Court permitted petitioner to amend his petition to raise specifically the question of the sufficiency of the evidence to support the order of deportation (R. 187-188).

general philosophy, not an indication that he joined to obtain the necessities of life. There is nothing in his testimony to show that he joined the Party as a means of getting food or money for himself. On the contrary, his testimony was that he ran the bookstore for the Party but "didn't get a penny there" (R. 107). Whatever may be the situation presented by other cases not before this Court (see Pet. 8-9), petitioner's activity in running the Communist bookstore itself shows that his membership was active and knowing. Since the evidence of the character of petitioner's membership is comparable to that before this Court in *Galvan*, his request for reconsideration of the *Galvan* ruling on the constitutionality of the statute in the light of the facts of his case (Pet. 10) raises no issues not decided by that opinion.³

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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BEATRICE ROSENBERG,
Attorney.

MARCH, 1956.

³See also the cases of Mascitti and Mrs. Coleman in *Harisiades v. Shaughnessy*, 342 U.S. 580, 582-3.

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No. 5

In the Supreme Court of the United States

OCTOBER TERM, 1957

CHARLES ROWOLDT, PETITIONER

v.

J. D. PERFETTO, ACTING OFFICER IN CHARGE, IMMI-
GRATION AND NATURALIZATION SERVICE, DEPARTMENT
OF JUSTICE, ST. PAUL, MINNESOTA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE EIGHTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE RESPONDENT
ON REARGUMENT

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 5

CHARLES ROWOLDT, PETITIONER

v.

J. D. PERFETTO, ACTING OFFICER IN CHARGE, IMMIGRATION AND NATURALIZATION SERVICE, DEPARTMENT OF JUSTICE, ST. PAUL, MINNESOTA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE RESPONDENT ON REARGUMENT

In our brief on the original argument, we submitted (Point II, pp. 38-43) that there was no reason to reconsider the constitutional holdings of *Galvan v. Press*, 347 U. S. 522 and *Harisiades v. Shaughnessy*, 342 U. S. 580. We pointed out that during the past five years the issue has twice been fully presented to the Court, in detail, and has twice been decided in comprehensive opinions. Petitioner brings forward no argument which has not been made heretofore. No changed conditions are, or can be, alleged; nor is the Court being asked to review decisions rendered in a period or milieu said to be outmoded, or based on

constitutional principles which are no longer accepted or have been limited since the challenged decisions were rendered. Since *Galvan*, the Court has recognized its constitutional principles as settled. *Jay v. Boyd*, 351 U. S. 345, 348 (recognizing the power in Congress under Section 22 to deport an alien who was a voluntary member of the Communist Party during the period 1935-1940); see also *Marcello v. Bonds*, 349 U. S. 302, 314 (rejecting the contention that deportation for crimes committed prior to passage of Section 241 (a) (11) of the Immigration and Nationality Act of 1952 is violative of the *ex post facto* clause); *Lehmann v. Curson*, 353 U. S. 685, 690; and *Mulcahey v. Catalanotte*, 353 U. S. 692, 694 (reiterating the rule that Congress may legislate retrospectively in deportation matters); and cf. *MacKay v. Boyd*, 218 F. 2d 666 (C. A. 9), certiorari denied, 350 U. S. 840.

For these same reasons, we are still of the view that sound judicial practice should impel the Court to accept the holdings of *Galvan* and *Harisiades* without reconsidering them. However, the issue of constitutionality has been raised and pressed by petitioner, and, since the case is to be reargued, it seems appropriate, for the convenience of the Court, to collect in a single brief in this case the pertinent portions of the discussions on that question in the various Government's briefs in *Galvan* and *Harisiades*—to which we fully adhere. It is also appropriate, in view of certain contentions made by petitioner, to repeat *in extenso* our argument in *Galvan* on the statutory point that Section 22 of the Internal Security Act of 1950 does *not* require a finding that the alien was aware of

the Communist Party's advocacy of the forcible overthrow of the Government.¹ In each instance, we col-
late, without more, the discussions in the earlier
briefs, believing them to be complete and adequate
for the purpose.

SUMMARY OF ARGUMENT

I

Just as was the case with the 1940 statute enforced in *Harisiades*, the 1950 Act does not require knowledge by the alien of the Communist Party's advocacy of the forcible overthrow of the Government.

A. On its face, the 1950 Act makes a clear distinction between membership in the Communist Party and membership in "front" organizations, requiring awareness of the organization's aims only in the latter case. The immediate legislative history of the 1950 statute emphasizes this plain distinction.

B. Moreover, the history, since 1918, of this class of deportation legislation plainly shows that personal advocacy or knowledge is not a prerequisite. The debates in Congress show this to be true; the consistent administrative practice by the Immigration Service is in accord; and the uniform judicial holdings since the 1920's are to the same effect.

C. No change in this respect was made by Public Law 14, the Act of March 28, 1951, 65 Stat. 28. That Act, which Congress regarded as a clarifying amendment which would not change the law, establishes that membership in an unlawful organization must

¹ This material is referred to, but not spelled out, in footnote 12, p. 31, of our original brief in the present case.

be "voluntary," not resulting from duress or compulsion, but it did not add any requirement of knowledge of the organization's unlawful objectives.

II

Section 22 of the 1950 Act, prescribing the deportation of past members of the Communist Party, is valid.

A. As the Court has repeatedly held since 1893, Congressional decisions to deport classes of aliens are political determinations not normally reviewable by the judiciary. The basis for this principle is that the power to expel is intimately connected with foreign affairs—since aliens remain subject to the control of a foreign state and their presence can thus lead to international controversies and embarrassment; as well as become a source of external danger. For this reason, the legislative power is held to be "plenary" (*Carlson v. Landon*, 342 U. S. 524, 534); the courts cannot intervene unless, perhaps, the action of Congress is a "fantasy or a pretense" or has "no possible grounds" to support it (*Harisiades v. Shaughnessy*, 342 U. S. 580, 590). The authority and the responsibility belong to Congress, and this Court and the lower courts have consistently upheld and enforced expulsion laws which have seemed to many to be harsh, discriminatory, or unfair, because judges have no concern with the "wisdom", "policy", "justice", or "severity" of those measures. *E. g.*, *Fong Yue Ting v. United States*, 149 U. S. 698; *Turner v. Williams*, 194 U. S. 279; *Tiaco v. Forbes*, 228 U. S. 549; *Ludecke v. Watkins*, 335 U. S. 160; *Harisiades v. Shaughnessy*, 342 U. S. 580. As against a legislative decree terminating their license to remain here, aliens (who have a divided allegiance and are not full members of the community) cannot

call upon constitutional protections as broad as those available to citizens. Conversely, because the nation's policy toward aliens touches so directly upon the conduct of foreign affairs, the political branches have full sway.

B. The validity of Section 22 is directly supported, not only by these traditional principles, but also by the decisions in *Harisiades*, 342 U. S. 580, and *Carlson*, 342 U. S. 524, 535-6. The latter held Section 22 valid as applied to present Communists, and the former sustained the prior deportation statute² as applied in 1952 to aliens who were members of the Communist Party before 1940, even though there was no showing that the aliens themselves advocated or knew that the Party advocated violent overthrow of the Government.

The two decisions, read together, cover petitioner's case which does not differ in its facts from instances before the Court in *Harisiades* and its companion cases. The Court recognized that the sponsors of the 1940 amendment wished to make sure that the law required deportation of former members of a subversive organization so as to make it impossible for alien members to avoid deportation merely by resigning from the party. Cf. *Kessler v. Strecker*, 307 U. S. 22.

The only difference, as applied here, between Section 22 of the 1950 Act and the 1940 Act upheld in *Harisiades* is the specification in the 1950 statute of membership in the Communist Party as a basis for deportation, thus removing the necessity of proving

² Section 23 (c) of the Alien Registration Act of 1940, 8 U. S. C. (1946 ed.) 137, subjecting to deportation aliens who, at any time after entry, had been members of an organization advocating the overthrow of the Government by force and violence.

again and again in deportation cases the nature and objectives of the Party. Congress based this determination upon overwhelming evidence, received by its committees between 1931 and 1950; that the Communist Party has as its purpose the violent overthrow of the Government of the United States and serves as a fifth column for the Soviet Union, largely through the aid of alien Communists. These conclusions are buttressed by repeated judicial decisions since 1920 as to the nature and purposes of the Communist Party, by some 200 administrative determinations in deportation cases since that time, as well as by the record of persistent espionage, sabotage, and propaganda by Communists here and elsewhere on behalf of the Soviet Union. In view of the purposes of the Party as found by Congress, Section 22 is a reasonable exercise of the legislative power to provide for the deportation of any class of aliens whose presence in this country may endanger the security of the United States. The ending of the alien's theoretical right to a hearing on the nature of the Communist Party is not a significant difference from *Harisiades*.

The power of Congress to name the Communist Party specifically is also supported by the history of the country's expulsion legislation which contains some famous precedents for group designation without regard to individual worthiness. The Chinese deportation laws are the prime illustration. The Alien Enemy Act of 1798, on which Congress drew by way of analogy, is another, as is the anarchist deportation statute.

C. The reaffirmation in *Harisiades* that deportation is not a punishment for the purposes of the

ex post facto clause of the Constitution disposes of petitioner's contention that Section 22 is a bill of attainder (as well as an *ex post facto* law), since a bill of attainder is a legislative act which inflicts punishment without trial. (*United States v. Lovett*, 328 U. S. 303, 315). See *Marcello v. Bonds*, 349 U. S. 302, 314; *Lehmann v. Carson*, 353 U. S. 685, 690; *Mulcahey v. Catalanotte*, 353 U. S. 692, 694.

D. The First Amendment is not violated by petitioner's deportation since he was a member of the Communist Party and *Harisiades* expressly holds (342 U. S. at 592) that deportation for past membership in that Party does not abridge First Amendment rights.

ARGUMENT

I

SECTION 22 OF THE INTERNAL SECURITY ACT OF 1950 DOES NOT REQUIRE A FINDING THAT THE ALIEN WAS AWARE OF THE COMMUNIST PARTY'S ADVOCACY OF THE FORCIBLE OVERTHROW OF THE GOVERNMENT

As pointed out in our original brief in this case (pp. 30-31), Galvan specifically argued that the Internal Security Act of 1950 exempted "innocent" past members of the Communist Party from deportation, and the Court expressly rejected that contention (*Galvan v. Press*, 347 U. S. at 525-6). This holding was unquestionably correct.

A. In the first place, as the Court observed, the 1950 Act makes a specific distinction between aliens who are or were members of the Communist Party and members of Communist-front organizations required to register under the Subversive Activities

Control Act; aliens belonging to such organizations are not to be deported if they "establish that they did not know or have reason to believe at the time they became members of or affiliated with such an organization * * * that such organization was a Communist organization." Subsection (2) (E), 64 Stat. 1007. With respect to this provision, the sponsor of the 1950 Act, Senator McCarran, said: "[A]liens who were innocent dupes when they joined a Communist-front organization, as distinguished from a Communist political organization [such as the Communist Party], would likewise not ipso facto be excluded or deported." 96 Cong. Rec. 14180.³ Thus, not only was the problem and its solution revealed on the face of the bill but they were also directly called to the attention of the Congress by the sponsor.

B. Moreover, the 1950 Act sought to "strengthen" the provisions of the former law relating "to the exclusion and deportation from the United States of subversive aliens" (H. Rep. 3112, 81st Cong., 2d Sess., p. 34), and it is plain that, even under the pre-1950 law, knowledge by the alien of the purposes of the subversive organization was not essential to deportability.

³ It is also significant that paragraphs (A), (B), (D), (F) and (G) of Section 1 (2) under Section 22 relate in whole or part to an alien's personal beliefs; and paragraphs (B), (C), (D), (F) and (H) relate in whole or part to membership in objectionable organizations, without any mention of the alien's knowledge or support of the objectives of such organizations. Moreover, Congress had no difficulty in specifying that certain misconduct had to be committed "knowingly", as it did in Paragraph (G), which deals with the circulation of inflammatory literature.

1. The legislative development of the Anarchist Deportation Act furnishes strong initial support for this conclusion as to the basic legislative design. The original immigration enactment directed against subversive aliens was the Act of March 3, 1903, 32 Stat. 1213, which dealt primarily with anarchists and prohibited their entry into the United States only on the basis of a personal belief in anarchy. These provisions were continued in the Act of February 20, 1907, 34 Stat. 898, and were recodified and somewhat expanded in the basic Immigration Act of February 5, 1917, 39 Stat. 874. Until then the statutes dealt only with personal beliefs.

These enactments were in effect superseded by the Anarchist Deportation Act of October 16, 1918, 40 Stat. 1012, enacted in the closing days of World War I in order to cope with what was believed to be the menace of the I. W. W. and other extremist factions. This legislation is the foundation upon which the later enactments in this area rest. In this statute, Congress provided for the first time for the deportation of aliens who were members of prohibited organizations. H. Rep. 645, 65th Cong., 2d Sess.

In the administration of the 1918 Act, the Department of Labor concluded that deportation charges could not be supported merely by proof of membership in the I. W. W., but that the evidence had to establish in addition personal advocacy of the proscribed doctrines on the part of the alien. See H. Rep. 504, 66th Cong., 2d Sess. Congress thereupon amended the Anarchist Deportation Act on June 5, 1920, 41 Stat. 1008, for the express purpose of insur-

ing that membership in an organization which advocated or distributed literature advocating the forceful overthrow of the Government of the United States would in itself be a basis for deportation. The report of the House Committee on Immigration and Naturalization, which recommended adoption of this legislation, described in detail the alleged misinterpretation of the Department of Labor, pointed out that the Department of Justice had not agreed with that interpretation, and expressed its dissatisfaction with the Department of Labor's rulings. H. Rep. 504, 66th Cong., 2nd Sess. The Committee further stated, *id.* p. 7:

In view of the foregoing the committee believes that Congress should amend section 1 of the act of October 16, 1918, and make it so plain and clear as to admit of no possible doubt that the spirit of the law must be held to coincide with the letter thereof.

Eminent lawyers contend that the act of October 16, 1918, is sufficient, and that *the joining of an organization such as the Industrial Workers of the World is of itself the overt act sufficient to warrant deportation.* But as the decision of the Secretary of Labor is final in matters of deportation,⁴ and as the decisions of that department above quoted have resulted in failure to deport aliens actively at work for the destruction of this Government, the necessity for the amendment becomes not only apparent but urgent. [Emphasis added.]

⁴On June 14, 1940, responsibility for administration of the immigration laws was transferred to the Attorney General. Reorganization Plan V, 5 F.R. 2223, 2132.

The principal changes achieved by the 1920 amendment were: (1) the designation of personal advocacy of proscribed doctrines, and membership in an organization advocating such doctrines, as separate causes for deportation; and (2) the addition of detailed directions for the deportation of aliens who distribute, or who are members of organizations which distribute, subversive literature. During the debate in the House of Representatives the following colloquy occurred, clearly portraying the legislative purpose (59 Cong. Rec. 999):

Mr. Hardy of Texas. I understand; if you can prove enough against him he can be deported; but what I want to know is, has the Secretary of Labor, under the law, a right to deport a man simply upon proof that he is a member of the I.W.W.?

* * * * *

Mr. Raker. If a man is a member of the organization teaching the doctrines that they do teach, that everyone knows and admits that they teach, that he holds a membership card which is found upon him, that he admits that he belongs to the organization and pays dues to the organization, the Government should deport him without a further overt act on his part.

Mr. Hardy of Texas. The gentleman from California thinks that every man who holds a card in the I.W.W. ought to be deported?

Mr. Raker. You can deport none but aliens. My statement is clear, and there is no doubt as to what it is. A man who belongs to an organization which advocates the unlawful de-

struction of property, who believes in anarchy which teaches the overthrow and destruction of the Government of the United States by force and violence, which teaches the assassination of public officers because they are public officers, should be deported. There can be no question that it is the intent of Congress, the intent of the American people, and the desire of ninety-nine persons out of a hundred of the men, women, and children who believe in this country, that this law ought to be enforced and enforced rigidly.

Not even Representative Hardy dissented when the bill subsequently was approved unanimously and without change in the House of Representatives. 59 Cong. Rec. 1003. The Senate Immigration Committee amended the bill by inserting "knowingly" in relation to circulating subversive literature, to make it conform with the prohibition against knowingly possessing such literature which was already in the bill. 59 Cong. Rec. 8539. Significantly, no similar change in relation to *membership* in a proscribed organization was suggested or adopted at any stage in the proceedings. The bill, as amended by the Senate Committee, was passed without comment or objection in the Senate (*ibid.*), and the House thereafter concurred in the Senate amendments. *Id.*, p. 8665.

We believe that this history of the 1920 amendment demonstrates that Congress intended, in the Anarchist Deportation Act and in its amendments, to deport alien members of the prohibited groups, without regard to whether their membership was maintained with knowledge of the denounced objectives.

2. The next major revision of the Anarchist Deportation Act occurred in the Alien Registration Act of June 28, 1940, 54 Stat. 670. Here, too, the legislative proceedings are instructive. In the original draft of this bill, the House Committee on the Judiciary urged that expulsion should be ordered if the alien, at any time after entry, "knowingly and voluntarily at any time became a member" of any of the designated classes. H. Rep. 994, 76th Cong., 1st Sess. p. 6. This phraseology appeared in Section 2 of the proposed bill, which was approved in this form by the House of Representatives. 84 Cong. Rec. 10,456.

The Senate Judiciary Committee in its initial report favored approval of the House bill without amendment, and thus proposed to continue the specification that the membership must have been "knowingly and voluntarily"⁵ undertaken. S. Rep. 1154, 76th Cong., 1st Sess.; 84 Cong. Rec. 11,124. However, this report was withdrawn and the bill was recommitted to the Committee. 86 Cong. Rec. 473. The Senate Committee thereafter issued a second report, S. Rep. 1721, 76th Cong. 3d Sess., but the exact form of the revision appears neither in that report nor in any statements on the floor of the Senate. However, the committee report stated (p. 2):

The amendment of the Senate committee striking out section 2, and inserting the language of existing law, was thought necessary to prevent hardship on aliens who may have, in the distant past, but who had renounced,

⁵ The distinction between knowledge and voluntariness implicit in this proposal should be noted.

before coming to the United States, their membership in such classes.

The report mentioned no requirement that the membership in *the United States* must have been knowing and voluntary. This report likewise was withdrawn (86 Cong. Rec. 7649) and a new and final report was issued by the Senate Committee, which set forth the bill as finally approved by the Senate. In this final revision, the declaration that the membership must have been "knowingly and voluntarily" assumed was omitted. S. Rep. 1796, 76th Cong., 3d Sess. There is no explanation as to the reason for that omission either in this report or at any other point in the legislative deliberations.⁶ However, this final report declared (p. 3):

Section 23 amends the act of October 16, 1918, which provides for the exclusion and deportation from the United States of aliens

⁶ While the bill was under consideration in the House, and at a time when it still contained the limitation that membership must have been acquired "knowingly and voluntarily," Representative Hobbs pointed out, 84 Cong. Rec. 10,448-9, that:

* * * in order to correct any possible hardships that might arise under the provisions of this section, on his motion, the words "knowingly and voluntarily" were inserted, so that the case of the poor Swede who joined the Communist Party without full knowledge of what he was doing, or the case of someone who might be under the influence of liquor or a narcotic and joined ignorantly, would be removed from the field of operation of this section * * *

Mr. Gwyane. But it does not cover the case of a man who joined voluntarily.

Mr. Hobbs. I realize that, and that of course is the crux of this situation * * *

who are members of the anarchistic and similar classes, so as to provide that no alien shall be admitted to the United States who has at any time been a member of such classes, and to also provide that any alien who has been a member of such classes at any time after his admission to the United States (for no matter how short a time or how far in the past so long as it was after the date of entry), shall be deported.

This statement of purpose was repeated in the Conference Report, H. Rep. 2683, 76th Cong., 3d Sess. p. 9:

The Alien Registration Act of 1940, 54 Stat. 670, as finally passed by Congress, thus eliminated the direction, which had been incorporated in earlier versions of the measure, that deportation could be ordered only if the membership in the revolutionary society had been knowing and voluntary. This omission should be compared with other directives in Section 20 of the same statute, 54 Stat. 672, commanding the deportation of aliens who "knowingly" aided other aliens to enter in violation of law, and in Section 2 (a) of that statute, 54 Stat. 671, which prescribed criminal penalties for aliens who "knowingly" advocate the overthrow of the Government of the United States by force and violence. The omission of similar language in the 1940 amendment of the Anarchist Deportation Act shows that Congress did not regard knowledge as an essential element in expulsion orders directed against alien members of subversive groups.

3. Administrative rulings have taken the same position. For at least thirty-five years, the Immigration Service has held proof of membership and (prior to 1950) of the nature of the organization to be sufficient, and has not deemed it necessary in its deportation proceedings to introduce evidence of the alien's personal beliefs or knowledge or to make findings thereon where the charge is one of membership.⁷ This practice and policy is revealed and confirmed by the available decisions of the Board of Immigration Appeals. See *Matter of H* [*Harisiades*], 3 I. & N. Dec. 411, 455, 458; *Matter of D*, 3 I. & N. Dec. 787, 788-9; *Matter of O*, 3 I. & N. Dec. 736, 777; *Matter of Coleman* (Transcript of Record, No. 264, Oct. Term, 1951, pp. 20-24); *Matter of Mascitti* (Transcript of Record, No. 206, Oct. Term, 1951, pp. 14, 17).⁸ And it is especially significant that, in the *Bridges* deportation case, neither Presiding Inspector Sears nor the Attorney General found that Bridges knew or was aware of the unlawful objective of the Communist Party, nor did either of them discuss the matter of Bridges' knowledge in connection with the finding of Party membership or of Party affiliation; the same is true of the

⁷Of course, where the charge is one of personal advocacy, evidence of the alien's beliefs has been introduced, and even in membership cases such evidence has sometimes been brought out, by the alien or the Service, where it is readily available.

⁸In some of its decisions in which counsel have raised the issue of knowledge (e. g., *Matter of O*, and *Mascitti's* case, *supra*), the Board of Immigration Appeals has said—in addition to holding flatly that it is unnecessary to prove knowledge—that membership in itself is sufficient evidence of knowledge of the proscribed doctrines, and also that the evidence showed that the alien attended Party meetings, read its literature, listened to speeches, and paid his dues.

decision of the Board of Immigration Appeals adverse to deportation. See Transcript of Record, No. 788, Oct. Term, 1944, pp. 73-106, 134-341, 367-492.*

The judicial decisions in Communist deportation cases also show that the administrative practice has been that findings as to the alien's awareness of the Party's doctrines are unnecessary, and it is sufficient to prove membership in the conventional sense. See, e. g., *Skeffington v. Katzeff*, 277 Fed. 129 (C. A. 1); *Antolish v. Paul*, 283 Fed. 957 (C. A. 7); *Ungar v. Seaman*, 4 F. 2d 80, 81 (C. A. 8); *Ex parte Jurgans*, 17 F. 2d 507, 511 (D. Minn.); *Ex parte Vilarino*, 50 F. 2d 582 (C. A. 9); *Murdoch v. Clark*, 53 F. 2d 155 (C. A. 1); *United States ex rel. Yokinen v. Commissioner of Immigration*, 57 F. 2d 707 (C. A. 2); *Kjar v. Doak*, 61 F. 2d 566 (C. A. 7); *Greco v. Haff*, 63 F. 2d 863, 864 (C. A. 9); *In re Saderquist*, 11 F. Supp. 525 (D. Me.), affirmed, 83 F. 2d 890 (C. A. 1); *Fortmueller v. Commissioner*, 14 F. Supp. 484 (S. D. N. Y.); *United States v. Wallis*, 268 Fed. 413 (S. D.

* Bridges excepted to Judge Sears' failure to find that "the evidence does not establish that the alien had knowledge that the Communist Party of the U. S. A. at any time was an organization, association, society, or group" with the proscribed objectives (Transcript of Record, No. 788, Oct. Term, 1944, pp. 351-2). The same point was raised in the District Court (see *Ex parte Bridges*, 49 F. Supp. 292, 301 (N. D. Cal.)), but was apparently not pressed in the Court of Appeals or in this Court. In *Bridges v. Wilson*, 326 U. S. 135, 149, the Court quoted an excerpt from the decision of Dean Landis, in the prior deportation proceeding, which indicated that Bridges expressed disbelief that the methods the Party wished to employ "were as revolutionary as they generally seem" and was unequivocal in his "distrust of tactics other than those that are generally included within the concept of democratic methods."

N. Y.). The same understanding of the administrative practice seems indicated by informed writers on the subject. See Landis, *Deportation and Expulsion of Aliens*, 5 *Encyc. of Soc. Sci.* (1930), p. 97 ("possession of the [radical] belief is unnecessary, mere ignorant membership in a radical party being sufficient"); Clark, *Deportation of Aliens from the United States to Europe* (1931), pp. 222-223; Van Vleck, *The Administrative Control of Aliens* (1932), pp. 38-39, 88-89, 129-131.

4. Judicial decisions are also in accord. Over the course of many years, the courts have invariably sustained deportation charges supported only by proof of membership in the Communist Party, coupled (prior to 1950) with an elaboration of that organization's violent objectives, without any requirement that the alien must be shown to know of and subscribe to those objectives. *E. g.*, *Skeffington v. Katzeff*, 277 Fed. 129 (C. A. 1); *Ex parte Vilarino*, 50 F. 2d 582 (C. A. 9); *In re Saderquist*, 11 F. Supp. 525 (D. Me.), affirmed, 83 F. 2d 890 (C. A. 1). Moreover, when the issue was raised, the courts have declared unequivocally that the alien's knowledge of or belief in the unlawful program of the Communist Party was not relevant to the consideration of such expulsion charges.

In none of these pre-1950 deportation cases does there appear to have been any administrative *finding* of knowledge of the Communist Party's aims or that the alien himself advocated forcible overthrow, and, also, in each case the court upheld the deportation order, without relying on evidence of the alien's

knowledge or belief, on the basis of a finding of membership in which "membership" meant precisely what it means in the administrative findings here. In *Ex parte Vilarino*, 50 F. 2d 582, 586 (C. A. 9), the Court of Appeals expressly sustained the deportation, in an alternative holding, "quite apart" from the meager "evidence" of personal knowledge. In *In re Saderquist*, 11 F. Supp. 525, 526-7 (D. Me.), affirmed on opinion below, 83 F. 2d 890 (C. A. 1), the judge specifically disregarded the charge that the alien personally advocated force and confined himself to the two charges involving membership in unlawful organizations; the opinion is limited to determining whether the Labor Department was "justified in finding that the organization in which the petitioner claims membership is one advocating the overthrow of our government by force" and quotes from *Kjar v. Doak*, 61 F. 2d 566, 569 (C. A. 7): "Nor was it necessary to prove that appellant had knowledge of the contents of the programs of the several organizations, or any one of them. It is sufficient if the evidence showed that he was a member of, or affiliated with, such an organization as contemplated by the statute." Similarly, *Kjar v. Doak*, *supra*, concerned itself solely with the issue of whether the Communist Party fell within the statutory class. The court first held—over the alien's objection that the Party advocated force only if the owners of capital refused to be peaceably dispossessed of their property once the Party has peaceably gained control of the government—that the evidence showed that the Party "believes and advocates the use of force and violence

whenever and wherever sufficient power is present to accomplish the purpose" (61 F. 2d at 568). Only then did the court hold alternatively that, even on the alien's view of the Party, it was proscribed. *Greco v. Haff*, 63 F. 2d 863, 864 (C. A. 9), is likewise contrary to petitioner's contention.¹⁰

In *Bridges v. Wixon*, 326 U. S. 135, there were no findings that the alien possessed knowledge of the unlawful character and aims of the organization which he was alleged to have joined or have affiliated himself with (see *Ex parte Bridges*, 49 F. Supp. 292, 301 (N. D. Cal.),¹¹ and the discussion *supra*, pp. 16-17), and this Court pointed out that "So far as this record shows the literature published by Harry Bridges, the utterances made by him * * * revealed a militant advocacy of the cause of trade-unionism. But they did not teach or advocate or advise the subversive conduct condemned by the statute" (326 U. S. at 148; see also p. 149). If petitioner's view of the statute were correct, the omission of any findings on Bridges' knowledge of the character of the proscribed

¹⁰ Other cases declaring or assuming the irrelevance of the alien's knowledge are *Ungar v. Seaman*, 4 F. 2d 80, 81-2 (C. A. 8); *Fortmueller v. Commissioner*, 14 F. Supp. 484, 487 (S. D. N. Y.); and *United States v. Wallis*, 268 Fed. 413, 415-6 (S. D. N. Y.) (the latter two are discussed *infra*). See also *Harisiades v. Shaughnessy*, 187 F. 2d 137, 141 (C. A. 2), affirmed, 342 U. S. 580.

¹¹ *Ex parte Bridges*, 49 F. Supp. 292 (N. D. Cal.) states: Congress has made alien membership in or affiliation with proscribed organizations grounds for deportation without reference to knowledge on the alien's part of the proscribed character of the organizations with which he has affiliated himself.

organizations, coupled with this evidence of his personal beliefs, would certainly have made for summary disposition of the charge based on membership in the Communist Party. Hardly more than a paragraph pointing out the deficiencies in the record would have been required. But the Court did not dispose of the case on that ground; on the contrary it discussed at length the inadmissibility of O'Neil's testimony as to the alien's membership. The latter half of the opinion (326 U. S. at 149-156) can only be read as adopting the view that "membership" in the deportation statutes means no more than membership in the ordinary sense—the voluntary enrolling of oneself in an organization.

Some pre-1950 lower court cases, which have sometimes been cited as opposed to our view, are in fact fully consistent with that position. *Fortmueller v. Commissioner*, 14 F. Supp. 484, 485 (S. D. N. Y.), involved two charges of personal advocacy of violence; as to these, the evidence plainly had to deal with the alien's beliefs and it is in connection with these charges alone that the court discusses such evidence. On the third charge (membership in the Communist Party) (14 F. Supp. at 487), the court does not refer to the alien's own knowledge or belief. *United States v. Wallis*, 268 Fed. 413, 415-6 (S. D. N. Y.), held that mere proof of membership in the Party was sufficient, and upheld a deportation order even though the alien apparently claimed that he understood the Party not to contemplate violence. In *Branch v. Cahill*, 88 F. 2d 545, 546-7 (C. A. 9), and *United States ex rel.*

Lisafeld v. Smith, 2 F. 2d 90, 91 (W. D. N. Y.), there happened to be evidence of personal belief which the court, quite naturally, set forth in upholding the deportation order; this does not mean, of course, that such evidence was essential.¹²

The short of the matter is that we know of no case, under the prior statutes, declaring that knowledge is essential where the charge is *membership*, and several decisions (beginning in the early '20's) stating that it is not required, or acting on that premise.

C. No change was made in this interpretation by Public Law 14, the Act of March 28, 1951, 82d Cong., 1st Sess., 65 Stat 28, which is discussed in the *Galvan* opinion (347 U. S. at 526-528), as well as in our original brief in this case (at pp. 19-28). As shown by the materials on the 1951 Act which are collected in our main brief, Congress did intend to apply the deportation provisions of the 1950 Act only to aliens whose Party membership was voluntary, but the requirement of voluntariness did not entail, in addition to an absence of coercion or legal incapacity, a finding that the alien was aware of or sympathetic with the unlawful objectives of the organization. There is nothing in either the terms or the history of the 1951 statute which inserts such a requirement into the Internal Security Act, contrary to the consistent legislative pattern which, as we have shown, has existed since 1918. On the contrary, during the legislative deliberations which preceded the enactment of the 1951 Act, the sponsors of the measure repeatedly in-

¹² *United States ex rel. Kethunen v. Reimer*, 79 F. 2d 315, 317 (C. A. 2); involved "affiliation" and not "membership."

sisted that it was not their purpose in that Act or in the Internal Security Act of 1950 to change previous law and that they "did not intend to nullify or to disturb the body of judicial and administrative interpretations" defining membership in subversive organizations. See H. Rep. 118, p. 2, S. Rep. 111, p. 2, 82nd Cong., 1st Sess. 97 Cong. Rec. 1370-1372, 1374, 1375, 2369, 2370, 2372-2373.

In summary, we have shown, that (a) the pertinent deportation provisions, both before and after their amendment in the 1950 Act, reveal a precise delineation between charges based on the alien's personal knowledge and beliefs and those predicated solely on his membership in designated organizations; (b) the legislative history of the Anarchist Deportation Acts of 1918 and 1920 shows that Congress intended to deport alien members of the prohibited groups, regardless of whether their membership was maintained with knowledge of the denounced objectives; (c) the legislative history of the Alien Registration Act of 1940 shows the same purpose; (d) administrative and judicial rulings since 1918 have taken the same position; and, (e) neither in the Internal Security Act of 1950 nor in Public Law 14 (Act of March 28, 1951), 82d Cong., 1st Sess., 65 Stat. 28, did Congress change this meaning; it is inconceivable that the 1950 or the 1951 Acts retreated from the consistent three-decades-long legislative, administrative, and judicial construction of the prior law.

II

CONGRESS HAS THE POWER TO PROVIDE, AS IN SECTION 22 OF THE INTERNAL SECURITY ACT OF 1950, FOR THE DEPORTATION OF ALIENS WHO AT ANY TIME AFTER ENTRY HAVE BEEN MEMBERS OF THE COMMUNIST PARTY

The issue of the validity of provisions for the deportation of past members of subversive organizations has been three times passed upon by members of the Court. The constitutionality of the provision in the Act of June 28, 1940 (54 Stat. 670, 673, 8 U. S. C. 137) for the deportation of aliens who were formerly members of an organization which advocates or teaches the overthrow of the United States Government by force or violence was first presented in *Bridges v. Wixon*, 326 U. S. 135. The Court, as such, found it unnecessary to pass upon the constitutional issues.¹³ Four of the eight sitting justices nevertheless expressed their views. Mr. Justice Murphy, in a concurring opinion, stated that the statute was unconstitutional. Chief Justice Stone, Mr. Justice Roberts, and Mr. Justice Frankfurter, dissenting, after considering non-constitutional arguments, declared (at p. 178) that:

Petitioner has made a number of other arguments which the Court finds it unnecessary to discuss. We think that they too are without merit. We would affirm the judgment.

Among these arguments were the constitutional questions.

The second occasion was in *Harisiades v. Shaughnessy*, 342 U. S. 580, in which the Court sustained that

¹³ Mr. Justice Jackson did not participate.

provision of the 1940 Act. The third time, of course, was in *Galvan v. Press*, 347 U. S. 522. In the light of petitioner's attack on that decision, we shall discuss the issue almost entirely on the basis of the pre-*Galvan* materials.

A. DECISIONS OF CONGRESS TO DEPORT CLASSES OF ALIENS ARE POLITICAL DETERMINATIONS WHICH THIS COURT HAS HELD ARE NOT REVIEWABLE BY THE JUDICIARY

1. As this Court has recently emphasized (*Shaughnessy v. Mezei*, 345 U. S. 206, 210): "Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." The enduring reasons for this judicial abstention were stated in *Harisiades v. Shaughnessy*, 342 U. S. 580. The Court pointed out that aliens, so long as they remain such, owe allegiance and loyalty to the state of their nationality which "could presently enter diplomatic remonstrance against * * * deportations if they were inconsistent with international law, the prevailing custom among nations or their own practices". (342 U. S. at 585). The alien, "[b]y withholding his allegiance from the United States [he] leaves outstanding a foreign call on his loyalties which international law not only permits our Government to recognize but commands it to respect" (342 U. S. at 585-586). In wartime, though the resident alien may be personally loyal to this country, his foreign allegiance to an enemy state must prevail over his personal preference (342 U. S. at 587). "But it does not require war to bring the

power of deportation into existence or to authorize its exercise. Congressional apprehension of foreign or internal dangers short of war may lead to its use. So long as the alien elects to continue the ambiguity of his allegiance his domicile here is held by a precarious tenure. That aliens remain vulnerable to expulsion after long residence is a practice that bristles with severities. But it is a weapon of defense and reprisal confirmed by international law as a power inherent in every sovereign state" (342 U. S. at 587-588). Significantly, the Court then observed (342 U. S. at 588-589):

It is pertinent to observe that any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.

The Court concluded (342 U. S. at 591) that, "in the present state of the world,"

it would be rash and irresponsible to reinterpret our fundamental law to deny or qualify the Government's power of deportation. However desirable world-wide amelioration of the lot of aliens, we think it is peculiarly a subject for international diplomacy. It should not be initiated by judicial decision which can only deprive our own Government of a power of defense and reprisal without obtaining for American citizens abroad any reciprocal privi-

leges or immunities. Reform in this field must be entrusted to the branches of the Government in control of our international relations and treaty-making powers.

The same considerations were stressed when the Court was first presented with the problem of the validity of a deportation statute, in 1893, in *Fong Yue Ting v. United States*, 149 U. S. 698. The Court then emphasized the powers of this country as a sovereign nation, the universal agreement that under international law each nation has full power to admit or expel any or all classes of aliens, and the intimate relation between this power over aliens and the international relations of the expelling country (149 U. S. at 705-711). On this basis, the Court concluded that "The power to exclude aliens and the power to expel them rest upon one foundation; are derived from one source, are supported by the same reasons, and are in truth but parts of one and the same power" (p. 713). Consequently, it held, in accordance with its prior decision in *The Chinese Exclusion Case*, 130 U. S. 581, that "The power to exclude or to expel aliens, *being a power affecting international relations*, is vested in the political departments of the government" (149 U. S. at 713, emphasis added).

In like vein, the Court said in *Mahler v. Eby*, 264 U. S. 32, 39, that "The right to expel aliens is a sovereign power necessary to the safety of the country and only limited by treaty obligations in respect thereto entered into with other governments." And

United States v. Curtiss-Wright Corp., 299 U. S. 304, 318, referred to the power to "expel undesirable aliens" as one of the integral incidents of sovereignty which "exist as inherently inseparable from the conception of nationality."

Independently of authority, there is full warrant for the view that the power to expel is directly bound up with the foreign affairs of the nation and must be treated as such. A resident alien remains the citizen of a foreign country, entitled to its protection and subject to its jurisdiction. In its relations with an alien, the United States is not bound simply by domestic law, but also by international law and treaty obligations. When an alien enters this country, the United States assumes not merely a domestic obligation but also a foreign obligation to the country of which he is a national. For any of its acts with respect to an alien, this country may be required to answer to a foreign nation. Whether the United States should continue that foreign obligation, a source of diplomatic complaint, or should terminate it by expelling the alien, is obviously a political question. Cf. *Tiaco v. Forbes*, 288 U. S. 549, where the Chinese government requested that 12 Chinese citizens be expelled from the Philippines. Expulsion of aliens has frequently been the subject of treaties and diplomatic negotiations.¹⁴ Expulsion has also been used as a powerful weapon of reprisal against similar actions by other countries.

¹⁴ IV Moore, *Digest of International Law*, pp. 67, et seq.; *The Chinese Exclusion Case*, supra, 130 U. S. at 607-608.

Likewise, the power to expel aliens exists, at least in part, as a protection against foreign dangers and for this reason, too, lies squarely within the field of international relations. The alien's foreign allegiance binds him by an external tie which may be used to our detriment—an injury against which Congress is entitled to guard.

2. These are the considerations which have led the Court repeatedly to hold and declare, in the more than 60 year span since 1893, that the substantive aspects of deportation legislation are subject only to minimal judicial review, if any at all. As already noted, the doctrine initially derived from decisions of the Court which established legislative finality with respect to the *exclusion* of aliens. That principle was firmly stated in the opinion in *The Chinese Exclusion Case*, 130 U. S. 581, 605, 606-607, where the Court observed that either in time of peace or in wartime, if the Government "through its legislative department" finds the presence of a class of foreigners to be inimical to our security, the legislature's determination is "conclusive upon the judiciary." Subsequently, in the first *expulsion* case, *Fong Yue Ting v. United States*, 149 U. S. 698, the Court summarized the differing positions of the legislative and the judicial branches in this field:

[1] The Court should "be careful that it does not undertake to pass upon political questions, the final decision of which has been committed by the Constitution to the other departments of the government" (149 U. S. at 712);

[2] "The power to exclude or to expel aliens,

being a power affecting international relations, is vested in the political departments of the government * * * (149 U. S. at 713); and

[3] Accordingly, "The question whether, and upon what conditions, these aliens shall be permitted to remain within the United States being one to be determined by the political departments of the government, the judicial department cannot properly express an opinion upon the wisdom, the policy or the justice of the measures enacted by Congress in the exercise of the powers confided to it by the Constitution over this subject." (149 U. S. at 731.)

Aliens "remain subject to the power of Congress to expel them, or to order them to be removed and deported from the country, whenever in its judgment their removal is necessary or expedient for the public interest" (149 U. S. at 724).

Such unrestrained power to terminate the residence of aliens, the Court explained, was not inconsistent with prior decisions holding that resident aliens enjoyed the protection of constitutional safeguards, including the due process clause. Referring to *Yick Wo v. Hopkins*, 118 U. S. 356, holding that aliens were protected by the due process and equal protection clauses of the Fourteenth Amendment, the Court declared: "The question there was of the power of a State over aliens continuing to reside within its jurisdiction, not of the power of the United States to put an end to their residence in the country" (149 U. S. at 725). Thus, while resident aliens are entitled to the privileges and immunities guaranteed by

th Constitution in domestic matters, including procedural due process in deportation proceedings (see, e. g., *Japanese Immigrant Case*, 189 U. S. 86, 100; *Wong Yang Sung v. McGrath*, 339 U. S. 33), the designation by Congress of classes of undesirable and deportable or excludable aliens pertains to international relations and is a political determination which "is conclusive upon the judiciary." *The Chinese Exclusion Case*, *supra*, 130 U. S. at 606.

No later decision of this Court has repudiated or modified this principle of full Congressional power to deport; and the Court has frequently reasserted it. *Lim Moon Sing v. United States*, 158 U. S. 538, 545, 547; *Wong Wing v. United States*, 163 U. S. 228, 231, 235, 237; *Li Sing v. United States*, 180 U. S. 486, 495; *Fok Yang Yo v. United States*, 185 U. S. 296, 302; *Japanese Immigrant Case*, 189 U. S. 86, 97-100; *Turner v. Williams*, 194 U. S. 279, 289-291; *Low Wah Suey v. Backus*, 225 U. S. 460, 467-8; *Tiaco v. Forbes*, 228 U. S. 549, 556-557; *Bugajewitz v. Adams*, 228 U. S. 585, 591; *Ng Fung Ho v. White*, 259 U. S. 276, 280; *Mahler v. Eby*, 264 U. S. 32, 39, 40; *United States ex rel. Volpe v. Smith*, 289 U. S. 422, 425; *United States v. Curtiss-Wright Corp.*, 299 U. S. 304, 318; *Harisiades v. Shaughnessy*, 342 U. S. 580; *Carlson v. Landon*, 342 U. S. 524, 534; *Shaughnessy v. Mezei*, 345 U. S. 206, 210; cf. *United States v. Ju Toy*, 198 U. S. 253, 261; *Zakonaite v. Wolf*, 226 U. S. 272, 275; *Lapina v. Williams*, 232 U. S. 78, 88; *Kwong Hai Chew v. Colding*, 344 U. S. 590, 597-8; cf. *Lehmann v. Carson*, 353 U. S. 685; *Mulcahey v. Ca-*

talanoite, 353 U. S. 692; *Rabang v. Boyd*, 353 U. S. 427.¹⁵

Prior to *Galvan*, *Harisiades v. Shaughnessy*, 342 U. S. 580, was the last application of the doctrine. The Court was asked to decide whether a provision calling for the expulsion of aliens who had at any time after entry into the United States belonged to an organization advocating the violent overthrow of the Government¹⁶ violated the due process clause of the Fifth Amendment. As in past decisions in this area, the Court observed that (342 U. S. at 589):

¹⁵ Cases which have sometimes been cited as modifying this principle have all involved determinations by the executive that a certain alien was a member of a deportable class previously established by the legislature, rather than a decision of Congress to deport a class of aliens whom it deemed undesirable residents. Only the latter is a political decision on a matter fundamentally affecting the public security. The administrative determination that a particular alien is a member of that class is a quasi-judicial determination, in the making of which the procedure employed must conform to procedural due process, since resident aliens are accorded the protection of the Constitution (*Yick Wo v. Hopkins*, *supra*; *Japanese Immigrant Case*, *supra*; *Wong Yang Sung v. McGrath*, *supra*). These cases do not hold, or state, that the due process clause restricts congressional decision with respect to the deportability of a class of undesirable aliens. Indeed, the very cases holding aliens entitled to procedural due process cite with approval the substantive constitutional doctrine of the *Fong Yue Ting* case. A recent instance is *Kwong Hai Chee v. Colding*, 344 U. S. 590, 597-598, where this Court, citing the *Fong Yue Ting* case, declared, "Although Congress may prescribe conditions for his expulsion and deportation, not even Congress may expel him without allowing him a fair opportunity to be heard."

¹⁶ Section 23 (a) of the Alien Registration Act of 1940, 8 U. S. C. 137.

Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.

See, also, *supra*, pp. 25-27.

It is true that the Court refrained from making an explicit reassertion of the proposition that under the Constitution the judiciary is without any power to override a legislative finding that a particular class of aliens is deportable, stating that the acknowledged "restraints upon the judiciary," while pertinent, did "not control today's decision * * *" (342 U. S. at 589-590). There was not, however, any repudiation of the general legislative finality first established by the *Fong Yue Ting* case, *supra*. On the merits, the deportation provision in question was held to be a reasonable one in the light of the Congressional power and Congressional responsibility in the area of foreign affairs and national security. And on the same day as *Harisiades* the Court used, in *Carlson v. Landon*, 342 U. S. 524, 531, words which are directly linked to the historic principle of the *Fong Yue Ting* case:

So long, however, as aliens fail to obtain and maintain citizenship by naturalization, they remain subject to the *plenary power of Congress* to expel them under the sovereign right to determine what noncitizens shall be permitted to remain within our borders. [Emphasis added.]

The *Harisiades* and *Carlson* cases, while perhaps withholding final judgment as to whether the judi-

ciary is devoid of *all* power to review an expulsion measure, at least make it clear that such a measure must be allowed to stand unless it can be said that the menace perceived by Congress is a "fantasy or a pretense," that there are "no possible grounds on which Congress might believe" that continued American residence of the designated class of aliens was "inimical to our security" (342 U. S. at 590). Judicial review of a legislative determination that a certain class of aliens is undesirable or a threat to our security is thus very narrowly circumscribed. Where Congressional power is "plenary", judicial authority to restrain is necessarily at its minimum.

3. In the more than sixty years since *Fong Yue Ting* was decided in 1893, the federal courts have consistently recognized and applied deportation provisions which have seemed to many—including some of the judges who have enforced them—to be harsh, discriminatory, or unfair. These laws have been upheld and enforced because the responsibility has been wholly Congress', and the courts have not swerved from a conscientious adherence to the view that the judicial branch has no concern with the "wisdom", "policy", "justice", or "severity" of these measures. *Fong Yue Ting v. United States*, 149 U. S. at 731; *Li Sing v. United States*, 180 U. S. 486, 495.

The *Fong Yue Ting* case itself upheld a statute which permitted the deportation of a Chinese laborer who had lawfully entered and had lived here for over a decade, solely because he could not prove his lawful residence by a white witness, as required by the

statute and regulations, although he could and did prove that he was entitled to remain by Chinese witnesses. 149 U. S. at 703-4, 729-730, 732.¹⁷ And where a Chinese person claimed American citizenship, the burden of proving non-alienage rested on him, although in all other cases the Government had the burden of showing alienage. See *Bilokumsky v. Tod*, 263 U. S. 149, 153.

Turner v. Williams, 194 U. S. 279, indicated that Congress would be competent to exclude or deport aliens who were anarchists only in the sense that they philosophically opposed all organized government, but who did not believe in achieving that ideal through force. 194 U. S. at 294.¹⁸ Through Mr. Justice Holmes, *Tiaco v. Forbes*, 228 U. S. 549, affirming 16 Phil. 534, sustained what was in effect a private deportation act by the Philippine legislature ratifying the Governor General's executive expulsion of 12 resi-

¹⁷ Previously, the Court had held in *The Chinese Exclusion Case*, 130 U. S. 581, that Congress could exclude a Chinese alien who, after lawful residence in the United States for 12 years (1875-1887), had taken a temporary trip to China, and had returned to this country one week after the passage of the Chinese Exclusion Act of 1888, even though he had been issued a certificate when he left entitling him to reenter and the Exclusion Act had become law after he departed from China on his return voyage. This was an exclusion case, but the alien had had a twelve-year residence in the United States. Cf. *Kwong Hai Chew v. Colding*, 344 U. S. 590.

¹⁸ Turner was arrested some 10 days after his entry and ordered deported on the ground that he came into the country in violation of the prohibition on entry of anarchists. 194 U. S. at 281.

dent Chinese aliens who were considered by him to be undesirable and a menace to public order; no hearing was held. The Court expressly declared that Congress could have taken the same action.

Ludecke v. Watkins, 335 U. S. 160, upheld the executive's power under the Alien Enemy Act of 1798 to remove, after the close of hostilities, enemy aliens some of whom might be personally loyal to the United States. See *Harisiades v. Shaughnessy*, 342 U. S. 580, 587, and *infra*, pp. 69-71. Similarly, aliens have been held deportable for knowingly having in their possession, for the purpose of distribution, printed matter advocating the forcible overthrow of the Government, although there was no proof that they personally held that conviction. *Tisi v. Tod*, 264 U. S. 131 (per Brandeis, J.). With the admonition that "judicially, we must tolerate what personally we may regard as a legislative mistake" (342 U. S. at 590), *Harisiades* sustained the deportation of past Communists who may have fully cleansed themselves of all Party taint and who, even while members, did not personally advocate violence or know the Party's tenets. See *infra*, p. 42, fn. 24.

Because the statute required deportation of aliens twice convicted of crimes involving moral turpitude, the Second Circuit, through Judge Learned Hand, upheld a deportation order against a young American-reared alien twice found guilty of burglary, even though it thought that deportation would be "deplorable", with a "cruel and barbarous result" which would be a "national reproach". *United States ex rel.*

Klonis v. Davis, 13 F. 2d 630 (C. A. 2).¹⁹ Though the case was extreme and the judge unusually outspoken, these words epitomize the traditional judicial attitude, both in this Court and the lower federal courts, toward deportation legislation—the power and the responsibility belong to Congress and the courts cannot and should not intervene in judgment, no matter how appealing the alien's contention or severe the legislative decree.²⁰

4. These settled principles prove the basic error in the repeatedly used analogy to cases concerning public employment and public office. Aliens are not in

¹⁹ The court said (13 F. 2d 630, 630-1) :

At any rate we think it not improper to say that deportation under the circumstances would be deplorable. Whether the relator came here in arms or at the age of ten, he is as much our product as though his mother had borne him on American soil. He knows no other language, no other people, no other habits, than ours; he will be as much a stranger in Poland as any one born of ancestors who immigrated in the seventeenth century. However heinous his crimes, deportation is to him exile, a dreadful punishment, abandoned by the common consent of all civilized peoples. Such, indeed, it would be to any one, but to one already proved to be incapable of honest living, a helpless waif in a strange land, it will be utter destruction. That our reasonable efforts to rid ourselves of unassimilable immigrants should in execution be attended by such a cruel and barbarous result would be a national reproach.

²⁰ For other pointed expressions of this attitude, see *The Chinese Exclusion Case*, 130 U. S. 581, 609; *Fong Yue Ting v. United States*, 149 U. S. 698, 731; *Li Sing v. United States*, 180 U. S. 486, 495; *Harisiades v. Shaughnessy*, 342 U. S. 580; 590, 596-598; *Shaughnessy v. Mezei*, 345 U. S. 206, 216; *Latva v. Nicolls*, 106 F. Supp. 658 (D. Mass.).

the same category as citizens who are public servants or seek to become such, or who seek to enter occupations or professions. The latter, because they are citizens and full members of the American body politic, have certain substantive rights against discriminatory treatment—*e. g.*, because of race, or color, or belief—which the courts will protect even as against legislatures. See *Wieman v. Updegraff*, 344 U. S. 183, 191-2; *United Public Workers v. Mitchell*, 330 U. S. 75, 100; *Schwabe v. Board of Bar Examiners*, 353 U. S. 232. But the alien, as every opinion since the *Chinese Exclusion* case shows (*supra*, pp. 29-34), has a different, and much more precarious status when the question is one of his exclusion or expulsion. He is not a full member of the political community, and the legislature's power to separate or exclude him is not limited, as with citizens, but "plenary" (342 U. S. at 534) and "largely immune from judicial control" (345 U. S. at 210). "Under our law, the alien in several respects stands on an equal footing with citizens, but in others has never been conceded legal parity with the citizen. Most importantly, to protract this ambiguous status within the country is not his right but is a matter of permission and tolerance. The Government's power to terminate its hospitality has been asserted and sustained by this Court since the question first arose" (*Harisiades v. Shughnessy*, 342 U. S. 580, 586-7, footnotes omitted).

A simple historical comparison of the statutory classes of excludable and deportable aliens with the legislative categories of persons who must be excluded

or separated from the public service demonstrates that alien legislation has been founded on racial and other considerations normally inadmissible in the regulation of government employment.²¹ The Chinese exclusion and deportation laws are, of course, the prime example (see, *supra*, pp. 29-30, 34-35; *infra*, pp. 68-69); the national origin and quota systems are others. See also *Turner v. Williams*, 194 U. S. 279, 294 (alien anarchists). The best that can be said for the analogy is that, if a substantive deportation provision is (like public employment legislation) to be measured by some theory of reasonableness or arbitrariness, the standard of acceptability is much lower,^{21a} and many considerations forbidden in the area of public employment may properly be taken into account.

This fundamental differentiation stems, as the Court has pointed out (342 U. S. at 585 ff), from the root fact that the alien, so long as he does not become naturalized, is not fused into the American community. He bears neither the full obligations of the

²¹ For an older listing of deportation provisions, see Clark, *Deportation of Aliens from the United States to Europe* (1931), pp. 60-69; and Van Vleck, *The Administrative Control of Aliens* (1932), pp. 3-22, 83; *et seq.* The current general deportation provisions are contained in Section 241 of the Immigration and Nationality Act of 1952, 66 Stat. 163, 204. The exclusion process is discussed in *Van Vleck, op. cit., supra*, at 3-22, 33 ff.

^{21a} See *Harisiades*, 342 U. S. at 590 ("a fantasy or a pretense"; "no possible grounds"), affirming 187 F. 2d 137 (C. A. 2) at 141 (giving as an example of an assumedly invalid statute, "that all blue-eyed aliens be deported").

citizen nor the citizen's undivided allegiance to this country; and Congress can rightly consider that his failure to become naturalized generally bespeaks an indifference to, or rejection of, full participation in American life. In this clashing world of sovereign states, moreover, the country cannot unilaterally deprive itself of a recognized and traditional "power of defense and reprisal"—often harsh and "bristl[ing] with severities"—against the unfriendly or unfavorable actions of foreign states. 342 U. S. at 587-589, 591. The alien's tenuous status is the price he must pay for not unequivocally throwing in his lot with this nation in a world which is not yet one.

B. THE DETERMINATION BY CONGRESS IN SECTION 22 TO MAKE DEPORTABLE ALIENS WHO AT ANY TIME AFTER ENTRY HAVE BEEN MEMBERS OF THE COMMUNIST PARTY IS AMPLY SUPPORTED BY THE LEGISLATIVE FINDINGS AND BY ADMINISTRATIVE AND JUDICIAL DECISIONS

If Congressional power to deport is plenary, as the decisions of this Court suggest (*supra*, pp. 29-34),²² there is little need to go further in order to uphold the

²² Congress appears to have viewed its power as absolute. See S. Rep. 2230, 81st Cong., 2d Sess., p. 26 (reporting on the very provision here in issue):

It is well established by numerous decisions of the Supreme Court that every sovereign nation has the power, inherent in its sovereignty, to forbid the entrance of aliens or to admit them upon such conditions as it may prescribe (*United States ex rel. Knauff v. Shaughnessy*, Supreme Court, Jan. 16, 1950; *Nishimura Ekiu v. United States*, 142 U. S. 651, 1892). A corollary to that essential power for its self-preservation is the inherent power of

validity of Section 22 of the Internal Security Act of 1950. Congress has made its meaning plain; it has ordered the deportation of aliens who, at any time after entry, became members of the Communist Party, even though they are no longer members when deportation proceedings are begun and even though there is no proof that they were aware of the Party's unlawful objectives. Under the slight measure of judicial review which remains, the statute must be upheld.

1. *The Harisiades and Carlson rulings, and their background.*—Not only does the *Harisiades* decision affirm that the judiciary assumes, at the very most, a subordinate role in reviewing Congressional deter-

a sovereign to deport aliens. (See *Tiaco v. Forbes*, 228 U. S. 549, 1913.) The authority of Congress over the admission of aliens is plenary, and it may exclude them altogether or prescribe the terms and conditions upon which they may enter and remain in the country. (See *Lapina v. Williams*, 232 U. S. 78, 1914; *Wong Wing v. United States*, 163 U. S. 228, 1896.)

See also the following statement by Senator Ashurst during the debate on the 1940 Act (86 Cong. Rec. 8345):

The United States has plenary power to invite any alien here it chooses to invite, and to exclude an alien at any time for a good reason, for a bad reason, or for no reason at all. The United States has full power, acting within its sovereignty, and it is not a breach of any alien's constitutional rights, to bar him at any time for any reason, or for no reason. In other words, a citizen need not give a reason why he invites a guest, and upon a guest there is certainly imposed the duty of behaving himself as well as the family behaves itself, and if an alien misbehaves, the sovereign plenary power of the Government is complete and full to exclude him at any time.

minations regarding the expulsion of undesirable aliens, but in holding that, on the merits, the provision there in question did not infringe the due process clause of the Fifth Amendment, the decision goes practically the whole road (together with *Carlson v. Landon*, 342 U. S. 524) toward validation of Section 22 of the 1950 Act.

(a). In *Harisiades*, the Court upheld the constitutionality of Section 23 of the Alien Registration Act of 1940, 8 U. S. C. (1946 ed.) 137, which made subject to deportation aliens who, at any time after entry, had been members of an organization advocating the overthrow of the government of the United States by force and violence.²³ The organization involved was the Communist Party of the United States, the aliens had discontinued their membership, and the cases were decided on the assumption that they had not personally shared or known the purpose of the organization (see 342 U. S. at 582-3).²⁴

²³ The statute was upheld against contentions that it was unconstitutional as an *ex post facto* law, and an infringement of the First and Fifth Amendments.

²⁴ The records in the three cases reported under *Harisiades v. Shaughnessy* are perfectly clear that there were no final administrative or judicial findings on the matters of personal belief in force or knowledge that the Party advocated force. As to *Harisiades*, the Board of Immigration Appeals expressly found "that the evidence of record does not establish that the respondent personally believed in or advocated the overthrow of the Government of the United States by force or violence" (Oct. Term 1951, No. 43, R. 873). *Harisiades* testified that force was to be used by the Party only defensively, and that he did not himself believe in the use of force and violence (No. 43, R. 38-48).

Coleman testified at her deportation hearing that she never heard anyone advocating the overthrow of the government

The attack on that statute was the same as that now made. No one disputed that there would be good

by force or violence and she herself did not believe in it (Oct. Term 1951, No. 264, Tr. 82). There was no finding of personal advocacy of force or of knowledge that the Party advocated force.

Mascitti testified at his hearing that he heard some speakers advocating the use of violence, that he did not personally believe in the forcible overthrow of the government, that he was not entirely clear as to what the policy of the Party was in that respect, and that he resigned when he discovered, or thought through, the aims and precepts of the Party (Oct. Term 1951, No. 206, Tr. 46-50, 78, 82-3). He also testified that he knew that the Party advocated the establishment of proletarian dictatorship by force or violence in the event that the capitalist class resisted, but that he did not believe that this would happen in the foreseeable future (No. 206, Tr. 17, 46, 48, 49). It was argued to the Board of Immigration Appeals that Mascitti did not know of the unlawful objectives of the Party, but the Board held that it was unnecessary to prove knowledge and also that membership, attendance at meetings, and reading Party literature is automatically equivalent to knowledge (No. 206, R. 17).

The Government presented these cases on the assumption that the aliens did not personally advocate force and did not know of the Party's advocacy of force. In its brief (Brief for the United States; Oct. Term 1951, Nos. 43, 206, 264) at p. 91, the Government stated:

some former members of the organization may have been unaware of or not in personal agreement with the policy of forcible overthrow. On these records, it must be assumed that there is no proof that these appellants had such personal beliefs or knowledge. In view of its interpretation of the statute as not requiring proof of more than past membership and the nature of the organization, the Immigration Service had not deemed it necessary to introduce evidence on these subjective matters in its deportation proceedings.

See also pp. 31-49, 87-89, of the Government's brief to the same effect.

reason for deporting aliens who are presently members, with full knowledge of the aims, of an organization advocating violent overthrow of the United States Government. The attack was on the ground that the statute required deportation of past members of such organizations, without regard to whether the alien remained a member, and without regard to whether he was proved to have personally advocated forcible overthrow or to have been aware that the organization so advocated. As the Court pointed out, several reasons caused Congress to conclude that the public welfare required deportation even in such cases.

(i). The bill which became the amendment of 1940 was before Congress when *Kessler v. Strucker*, 307 U. S. 22, was decided in 1939. The sponsors of the legislation, Representatives Smith of Virginia and Hobbs of Alabama, believing that the decision holding past membership in a subversive organization not to be grounds for deportation was contrary to what they regarded as "the clear language of the [prior] law" (84 Cong. Rec. 10449; Hearings before Subcommittee of the Senate Committee on the Judiciary, 76th Cong., 3d Sess., on H. R. 5138, p. 14),²⁵ inserted in the bill then before the House a provision which would make the legislative intent clear beyond peradventure (Hearings, *supra*, p. 12).

In explaining the reason for the amendment, it was repeatedly stated that the *Strucker* decision permitted an alien to evade deportation by resigning from the

²⁵ Representative Hobbs stated that "with all due respect, that seems to be a rather strained construction" (84 Cong. Rec. 10449).

organization before the Government could catch up with him. Thus, Representative Smith stated (84 Cong. Rec. 9537):

This amendment changes that so as to avoid the situation where a person who, upon being suspected, could resign from that organization and say, "I was a member of that organization last week but I have resigned and you cannot deport me." That is exactly the situation under the law in the Strecker case. This makes it plain that a person who advocates the overthrow of this Government by force, and belongs to a party that recommends that to its people, shall be deported whether he belongs to it now or whether he belonged to it yesterday or last year, if he is an alien.

Representative Hobbs, in explaining the House bill before the Senate Committee (Hearings, *supra*, p. 16), had previously declared:

We do not believe that because "Joe" Strecker, after the third hearing which was granted to him by law, and the adroit coaching of his lawyer, which is admitted in the record, said, "Why, I had my fingers crossed; I have quit; I have resigned"—we do not think that is any reason on earth to keep "Joe" Strecker here. * * *

Representative Robsion of the House Judiciary Committee stated in the same connection (84 Cong. Rec. 10367):

Those opposing this bill want the law to remain as it is. It provides for the deportation of Communists, anarchists, and so forth, but a recent decision of the Supreme Court in the

noted Strecker deportation case held that the Government would have to prove that these aliens were anarchists or Communists at the time deportation proceedings were instituted. These Communists and anarchists and other such groups seeking to overthrow this Government, found a way to get around the law. Their leaders advised their members to say when they were arrested, "Yes, we did belong to the Communists or anarchists, but some time ago we resigned. We decided not to belong to the organization any longer."

Strecker, a Communist alien, was apprehended. He readily admitted that he had been a Communist, he had his membership card, but claimed that he had recently resigned from that party. The Supreme Court held that in view of that statement Strecker could not be deported.

* * * * *

* * * Without this new law, anarchists, Communists, and other like organizations will continue to flourish and grow and endanger the very life of this Nation, its citizens, and their property.

Representative Blackney summarized the view which prevailed as follows (p. 10365):

This amendment changes that so as to avoid the situation where a person, who, upon being suspected, could resign from that organization and say, "I was formerly a member of that organization, but I have now resigned."²⁶

²⁶ During the debate on the Anarchist Deportation Act of 1918, Representative Burnett, Chairman of the House Committee on Immigration and Naturalization, rejected a suggestion that deported subversives be permitted to return, upon

These were Congress's reasons for making past membership in the party grounds for deportation. It considered that voluntary withdrawal from membership may often be a mere subterfuge, not affecting adherence to fundamental principles.

(ii). Congress also realized that the 1940 amendment might reach aliens who had reformed, but felt nevertheless that such aliens were undesirable aliens not entitled to the continued hospitality of this country. In successfully opposing an amendment which would have excepted persons who had abandoned membership in good faith for five years, Representative Hobbs declared (84 Cong. Rec. 10448-9):

I shall give the underlying philosophy of this section. It is that in this day and time we have floods of applications from perfectly good aliens who want to come here and make their homes and make the same splendid contribution to our civilization that good aliens have throughout the ages. This country has been builded by good aliens who have come here and have worked wonderfully with the good people of this Nation.

We are all aliens, if you trace the family tree far enough, so we have no prejudice against aliens. With the world to select from, with the cream of the alien world seeking admission, when we are unable to accommodate millions be-

a showing that they had "sincerely reformed," stating (56 Cong. Rec. 8122):

I think not; and I do not think we should adopt anything that would, because it would open the door to too many cases of *pretended reformation*. [Emphasis added.]

cause of our quota limitations, why not select the best? Why insist upon keeping some of the worst? They may have sinned only once, but there are thousands who have never sinned. I prefer those. You may as well say that one slip, one sin, does not militate against chastity. No matter how long since, nor for how short a time, anyone may have knowingly and voluntarily strayed from the straight and narrow path of virtue, he cannot be sinless. Of course there is virtue in sincere repentance. Many really reform. Forgiveness is a divine attribute, which we should practice whenever possible. We are perfectly willing to forgive every one of those aliens who brought or bring themselves within the purview of this title. This title inflicts no punishment upon any of them: it says to them, "Go and sin no more."

They came to our home and plotted the destruction of our Government that bade them welcome, but all we do here is to send them—not to prison or gallows—but back to their own home.

Though we deal only in such kindly fashion with them, we feel in duty bound to prefer those who have never been guilty of allowing themselves to be inoculated with the poison virus of those alien isms that seek to destroy our Government by violence. That is the issue.

See also the Senate Hearings, *supra*, pp. 14-15, in which Representative Hobbs stated:

Now, then, is that harsh? We think not, and for this reason, Senator Danaher—since this was your question, I am directing my answer primarily to you—for this reason: This is not a question of a criminal prosecution. This

is not a question of dealing with the vested rights of anyone. No alien has any vested right to remain here. * * *

Now, the thought back of this amendment is simply this—that we have at this time in the history of the world the rarest opportunity that has ever come to America to select the best of those who wish to come here, and every one of these who has been at any time a member of a subversive faction advocating the overthrow either of all government or of this Government can well be replaced from the standpoint of the good of America by someone who has never been diseased with that mania. In other words, says that I was in Italy before I came here; I am an immigrant; say that I was a member of the Communist Party, and I believed wholeheartedly in its principle of the destruction of all organized government; I am an anarchist; I am one of the dirk wielders; I am one of the strong-arm boys. Now, I get religion, or any other uplifting influence comes into my life, or I completely recant. Well, that may be permanent, or it may not; but we said we would rather had one who had never been; and it is our choice. Now, there are plenty of good people in Italy who have never sinned in that regard; who have always believed in some established government; who have never sunk a dirk in one's back.

He also stated (84 Cong. Rec. 10359):

Aliens in the United States are exactly analogous to visitors in your home. No guest in your home has the same rights as do your children. They have no vested right to remain here.

In short, the view of Congress was that it can select and limit the number and kind of aliens it wishes to allow to remain in the United States; aliens who were at any time connected with a subversive organization are less desirable than others; although such aliens may reform, past members of such organizations are more likely to be susceptible in the future to the "poison virus" and therefore to become dangerous, or at least undesirable, residents of the United States. Even though this may not be true of all of them, classifying the group, as such, as undesirable for purposes of deportation is not an arbitrary or irrational judgment to be overturned by the courts.

(b). The present case (and *Galvan*) are almost the same as *Harisiades*. Petitioner has been ordered deported because of his discontinued Communist Party membership, in the absence of a showing of subjective advocacy of the Party's ends. The sole distinction is that in *Harisiades* there were administrative findings that at the time the aliens belonged to the Communist Party it taught and advocated the overthrow of the government of the United States by force and violence, while under Section 22 of the 1950 Act, because it makes past or present membership in the Communist Party *per se* grounds for deportation, no such finding is necessary. As a result, there has been no occasion for petitioner to show that at the time of his membership the Party did not advocate the violent overthrow of the government.

The argument that the vice of the 1950 Act is this lack of opportunity to show that the Party did not advocate forcible overthrow was seriously undermined,

at its very foundation, by the explicit declaration in *Carlson v. Landon*, 342 U. S. 524, decided the same day as *Harisiades*, that "We have no doubt that the doctrines and practices of Communism clearly enough teach the use of force to achieve political control to give constitutional basis, according to any theory of reasonableness or arbitrariness, for Congress to expel known alien Communists under its power to regulate the exclusion, admission and expulsion of aliens" (342 U. S. at 535-536). This was said with direct reference to Section 22 of the Internal Security Act,²⁷ and the only difference was that the aliens in the *Carlson* case were charged with present membership in the Communist Party.

There would seem little reason to accord less standing, in a deportation case, to a solemn Congressional declaration as to the past status of the Communist Party than to a finding directed to the present. In any event, *Harisiades* disposed of the contention that the alien charged with past membership must, unlike

²⁷ The Court said immediately before the sentence we have quoted in the text (342 U. S. at 534-535):

Changes in world politics and in our internal economy bring legislative adjustments affecting the rights of various classes of aliens to admission and deportation. The passage of the Internal Security Act of 1950 marked such a change of attitude toward alien members of the Communist Party of the United States. Theretofore there was a provision for the deportation of alien anarchists and other aliens, who are or were members of organizations devoted to the overthrow by force and violence of the Government of the United States, but the Internal Security Act made Communist membership alone of aliens a sufficient ground for deportation. The reasons for the exercise of power are summarized in Title I of the Internal Security Act.

the present member, be accorded a hearing on the nature of the Communist Party. The Court held that Congress in "exercising the wide discretion that it alone has in these matters * * *" could eliminate the administrative burden of proving in each case that an alien who had discontinued his Communist Party membership had not "sincerely renounced Communist principles of force and violence * * ." (342 U. S. at 595-596). Under that statute aliens were given no opportunity to present testimony that at the time of the deportation proceeding they were, as individuals, no longer a threat to our national security. Because Congress has such wide discretion in this area, and because there was reason for Congress to believe that in many cases, if not in most, aliens who ostensibly discontinued their Party membership did not do so in fact, this provision was held not to violate the due process or *ex post facto* clause (see 342 U. S. at 593-596). Significantly, the Court treated the 1940 deportation provision, there involved, as directed mainly at Communists, and paid much attention to the nature and activities of the Communist Party, particularly as Congress had a right to view it. See 342 U. S. at 590-1, 593-4, 595-6.

The statutory change embodied in Section 22 of the 1950 Act also sought to lift from the government a difficult and unnecessary administrative burden, namely, that of introducing again and again in deportation proceedings evidence as to the nature and activities of the Communist Party.²⁸ This action by

²⁸ See *infra*, pp. 62-65, for a recital of (a) the legislative findings in the 1950 Act on the nature of the Communist Party,

Congress is fully sustained by the Court's holding in *Harisiades* that it was proper for Congress to eliminate the burden of distinguishing between sincere and fraudulent disaffiliations from the Communist Party. Even assuming that in the past 30 years there may have been intervals during which the Party did not advocate doctrines inimical to our security (but see *infra*, pp. 55 ff), the administrative task of ascertaining whether a particular alien's membership coincided precisely with such an interval is similar to, and at least as onerous as, that eliminated by the 1940 provision upheld in *Harisiades*. In fact, the very problem which Congress sought to obviate by the earlier provision would be repeatedly raised if petitioner (and others) were to be allowed to claim as a defense that the Party during their terms of membership had only innocent purposes. It would then become necessary in each case to determine whether the alien's apparent disaffiliation at the time the Party resumed its advocacy of violent overthrow of the government was sincere and genuine and not merely a subterfuge. Moreover, not only would the individual alien's motives in leaving the Party have to be examined, but it would also be necessary to ascertain whether the Communist Party had during the period in question actually relinquished its usual aims and methods.²⁹ On the basis of this Court's holding in *Harisiades*, Congress has the power to de-

(b) the court decisions on that issue, and (c) the number of deportation cases involving the issue since 1920.

²⁹ Congress was concerned with this problem. See *infra*, pp. 61-62.

cide that this need not be the government's burden, but that the operating postulate is to be that the Party has always advocated the use of force. And to deprive the alien of the right to show otherwise—not a significant right, in actual fact (see *infra*, pp. 55 ff)—is surely no more inadmissible than to make irrelevant a showing of reformation and change, a showing which some aliens could make with far greater ease and possibility of success than they could demonstrate that the Communist Party did not advocate force.

In short, the *Carlson* and *Harisiades* cases—read together against the prior rulings of this Court and the history of deportation legislation—make clear that alien Communists are deportable, and that Congress can reasonably provide that discontinuance of membership in the Communist Party need not be taken into account. In those cases, the Court took its stand (as we have already recalled) on the breadth of the legislative power. It upheld what was regarded in historical context as “an extreme application of the expulsion power” (342 U. S. at 588). The Court thought that “in the present state of the world, it would be rash and irresponsible to reinterpret our fundamental law to deny or qualify the Government’s power of deportation”. The “world-wide amelioration of the lot of aliens * * * is peculiarly a subject for international diplomacy” and “reform in this field must be entrusted” to the political branches. 342 U. S. at 591. If there is to be a policy of forgiveness and recognition of reformation, it is for Congress to provide (342 U. S. at 595).

2. *The particular history of Section 22 of the 1950*

A . . .—Unlike the prior statute, the 1950 Act does expressly name the Communist Party. We believe, as we have argued (*supra*, pp. 41 *ff*), that the reasoning and holdings of the *Harisiades* and *Carlson* cases, together with the accepted principles in the field of deportation, support Section 22 even on the assumption that there may have been isolated periods when the Communist Party did not teach and advocate the violent overthrow of the Government. But it is not necessary to make that assumption. The history of Section 22 discloses an extensive background of exhaustive study culminating in a finding by Congress that the Communist Party of the United States has at all times been a threat to the national security. We turn to consider this legislative history, as well as the judicial and administrative decisions which have consistently upheld the same conclusion as that reached by Congress with regard to the menacing character of the Communist Party.

In 1931, a special committee of the House investigated and reported on Communist propaganda in the United States (H. Rep. 2290, 71st Cong., 3d Sess.). That committee cited the language of the program of the Communist Party as established by the Comintern at the Sixth World Congress, September 1, 1929, at Moscow to the effect that (H. Rep. 2290, *supra*, p. 15):

The communists consider it unworthy to dissimulate their opinions or their plans. They

proclaim openly that their designs can only be realized by the violent overthrow of the entire traditional social order.

The report concluded that (H. Rep. 2290, *supra*, pp. 65-66):

It is self-evident that the communists and their sympathizers have only one real object in view, not to obtain control of the Government of the United States through peaceful and legal political methods as a political party, but to establish by force and violence in the United States and in all other nations a "soviet socialist republic" to which they often refer in their literature as a "dictatorship of the proletariat." These facts have been repeatedly substantiated at the hearings of the committee.

In 1935, the McCormack committee of the House, which was charged with the investigation of Nazi and other propaganda, found "both from documentary evidence submitted to the committee and from the frank admission of Communist leaders * * *" that the objectives of the Party included the overthrow by force and violence of the Government of the United States. H. Rep. 153, 74th Cong., 1st Sess. (1935), p. 12. It concluded that the Party "is a party recognized on an international scale, governed and controlled by a constitution and rules emanating from the Communist International with headquarters at Moscow in the Soviet Union, and dedicated to the overthrow of the government by violence and force." H. Rep. 153, *supra*, p. 21.

In 1939, extensive hearings before the House Committee on Un-American Activities informed Congress

that in 1929 the Soviet Union, acting through the Communist International, ejected Lovestone and Gitlow from the leadership of the Communist Party of the United States and replaced them with Foster and Browder.³⁰ Current evidence of foreign control of the Party was furnished to Congress when, with the signing of the Hitler-Stalin Pact in August 1939, resistance to Nazi aggression suddenly became an "imperialistic war" in the view of American Communists. Also, between 1938 and April 1940, Congress had observed how the ideological allies of Hitler in Austria, Czechoslovakia and Norway had aided in subjecting those countries to Nazi rule.

Thus, by 1940, Congress was not merely concerned with the old-fashioned concept of domestic insurrection, but with the more subtle and dangerous situation in which a local totalitarian political group, whether Communist or Nazi, is the actual or potential fifth column ally of the totalitarian government by which it is controlled. Section 23 (a) of the Alien Registration Act of 1940, in making deportable aliens who had at any time been members of a group advocating the violent overthrow of the Government, was part of a larger statute, part of which, known as the Smith Act, was upheld by the Court (as there applied) in *Dennis v. United States*, 341 U. S. 494, and part of which required the registration of aliens. The same Congress also enacted the Voorhis Act of October 17, 1940,³¹ requiring the registration of "Every organiza-

³⁰ Hearings before House Committee on Un-American Activities on H. Res. 282, 76th Cong., 1st Sess. (1939), vol. 7, pp. 4432, 4671.

³¹ 54 Stat. 1201, 18 U. S. C. 2386.

tion subject to foreign control which engages in political activity," and understood that the Communist Party of the United States would be required to register.³² The *Harisiades* opinion expressly recognizes that the 1940 Congress directed the deportation provision there in question against alien Communists because of "alarm about a coalition of Communist power without and Communist conspiracy within the United States" (see 342 U. S. at 590-1).

Between 1940 and 1950, Congress observed that Communist parties everywhere are simply the fifth column of Soviet aggression. Where they have obtained power, as in Czechoslovakia, they have done so by violence, destroyed their political opponents, and degraded their native lands into satellites of the Soviet Union. Where they have not obtained power, they carry on, in the United States and elsewhere, espionage, sabotage, and propaganda on behalf of the Soviet Union. American troops fought with the United Nations in Korea to check Communist aggression, while this country has entered into costly and unparalleled military alliances to discourage Communist aggression elsewhere.

Section 22 of the Internal Security Act originated in S. 1832, 81st Cong., 2d Sess., which was passed by the Senate on August 9, 1950, and was later incor-

³² H. Rep. 2582, 76th Cong., 3d Sess. Immediately, the Communist Party of the United States ostensibly withdrew from the Communist International to avoid registration under the Voorhis Act. See resolution adopted at the 1940 Convention of the Communist Party, reproduced in the record in *Dennis v. United States*, 341 U. S. 494, vol. XIV, pp. 11180-11181.

porated by the Senate into the internal security bill (S. 4037, 81st Cong., 2d Sess.), S. 1832 was introduced by Senator McCarran in May 1949,³³ and was the subject of extensive hearings, between May and September 1949, before the Subcommittee on Immigration and Naturalization of the Senate Committee on the Judiciary, under the heading of *Communist Activities Among Aliens and National Groups*.

After these hearings, S. 1832 was revised to provide, *inter alia*, for the deportation of aliens who have at any time been members of the Communist Party of the United States. It was passed by the Senate without debate (96 Cong. Rec. 12058, 12060). However, the accompanying report of the Senate Committee on the Judiciary (S. Rep. 2230, 81st Cong., 2d Sess.), after summarizing and quoting from the testimony of former high officials of the Communist Party during the 1949 hearings, set forth the conclusions upon which the provision is based, as follows (pp. 10, 11, 12, 16):

Since the rise of Soviet Russia during the past three decades, the problem of subversives has become a vital consideration in any evaluation of national immigration and naturalization policies. The impact of world events upon our immigration system can no longer be ignored. As an international conspiracy, communism has organized systematic infiltration of our borders for the purpose of overthrow-

³³ As originally introduced, S. 1832 would have provided stricter controls over visas and other travel documents, and strengthened the laws governing the exclusion and deportation of subversive aliens, without specially referring to the Communist Party of the United States.

ing the democratic Government of the United States by force, violence, and subversion.

* * * * *

The Communist International has in its employ a network of agents whose sole function is to organize and promote Communist activity, sabotage, espionage, propaganda, and terrorism. These agents are sent into the United States and other countries under the policy of the Communist high command. Although some of the agents are native-born Americans or have acquired citizenship through naturalization, a large majority of them are aliens.

* * * * *

The Comintern realizes that it cannot rely on native Americans because to do so involves the constant risk of having its work impeded or exposed. It is to be expected that the loyalty of a native American or of a citizen of long standing would occasionally reassert itself, despite the most intensive Communist indoctrination.

The break with the Communist Party by men like Louis Budenz, Howard Rushmore, Jay Lovestone, Benjamin Gitlow, and others offers conclusive proof to Moscow that it can only rely on its own chosen agents for the work of destroying America. In the event of a clash of arms between the Soviet homeland and this country, the Communists would find it even more difficult to rely upon native Americans and those of foreign origin who become Americanized.

* * * * *

It is a well-established fact that both the leadership and membership of the Communist

Party is recruited overwhelmingly from alien ranks. During the course of its 30 years of existence in this country the Communist Party has been ruled exclusively by alien agents appointed by the Communist International headquarters in Moscow.

The high command of the party in this country invariably has been dominated by aliens or persons of foreign origin. These facts have been documented by the testimony presented before the subcommittee.

* * * * *

From the statements made before the subcommittee, as well as the general evidence gathered—the history of the Communist movement, the changes of its policies, the manner of its expression, the utterances of the Comintern leadership—the conclusion is inescapable that the Communist Party and the Communist movement in the United States is an alien movement, sustained, augmented, and controlled by European Communists and the Soviet Union. The severance of this connection and the destruction of the life line of communism becomes, therefore, substantially an immigration problem.

After reviewing existing law, the Committee noted (pp. 24-25) that:

* * * While Congress has clearly proscribed classes of aliens which are to be excluded from admission or deported after admission, there is the obvious difficulty of establishing that certain aliens or organizations do advocate overthrowing the Government by force or violence. It is inherent in the tactics of such persons and

organizations that their real intentions be concealed under an aura of legitimacy in order to accomplish their purpose. Thus, though it may be common knowledge that certain organizations advocate such beliefs, satisfactory proof of that position offers a formidable obstacle. The evidence developed by the subcommittee should remove any doubt about the Communist Party's advocating the overthrow of our Government by force or violence in order to consummate its plans of a world-wide Communist totalitarian dictatorship. Yet, membership in the Communist Party, without positive proof that it so advocates the overthrow of government by force and violence, is insufficient grounds for deporting such an alien member.

The substance of the Committee's conclusions is embodied in the findings which Congress made in Section 2 of the Internal Security Act as to the purposes and methods of communism, "as a result of evidence adduced before various committees of the Senate and House of Representatives" (64 Stat. 987-989). The first of these findings states:

There exists a world Communist movement which, *in its origins, its development, and its present practice*, is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, * * * and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world through the medium of a world-wide Communist organization. [Emphasis added.]

The bitter debate over the internal security bill did not relate to Section 22. Indeed, the dissenting minority of the Senate Committee on the Judiciary

stated that "We do not quarrel with the provision * * * for the exclusion of alien members of the Communist Party of the United States, or with the later provision [Section 22 of the Internal Security Act] for their deportation. It is undisputed that the Communists of the world, including the United States, are the fifth column allies of the Soviet Union." S. Rep. 2369, Part 2, 81st Cong., 2d Sess., p. 14.³⁴

In the context² of the legislative findings, Section 22 is thus a substantially unanimous Congressional determination, based on years of legislative investigation, that the Communist Party of the United States has at all times been a foreign-controlled organization devoted to the ultimate overthrow of the government by violence and, more immediately, acting as a fifth column in aid of Soviet aggression.³⁵

3. *Judicial and administrative adjudications as to the Communist Party.*—As the Court has observed, " * * * a declaration by a legislature concerning public conditions that by necessity and duty it must know, is entitled at least to great respect." *Block v. Hirsh*, 256 U. S. 135, 154. When such a declaration by Congress is supported not only by its own investigations but by repeated judicial and administrative determinations that the Communist Party has advo-

³⁴ Section 22 was not contained in the internal security bill as it passed the House (see H. Rep. 3112, 81st Cong., 2d Sess., p. 48; 96 Cong. Rec. 15287). It was added by the Senate and included in the conference substitute. The debate in the House on the conference bill, and in overriding the Presidential veto, did not touch directly on Section 22.

³⁵ Section 22 has now been embodied in the Immigration and Nationality Act of 1952 (Pub. Law 414, 82d Cong.) as Section 211 (a) of that Act.

cated the violent overthrow of the Government, it should not be disturbed in the absence of the most extraordinary circumstances. See *Skeffington v. Katzeff*, 277 Fed. 129 (C. A. 1) (covering the period 1919-1920); *Antolish v. Paul*, 283 Fed. 957 (C. A. 7) (early 1920's); *Ungar v. Seaman*, 4 F. 2d 80, 81 (C. A. 8) (1912-1920); *Ex parte Jurgans*, 17 F. 2d 507, 511 (D. Minn.) (early 1920's); *Ex parte Vilarino*, 50 F. 2d 582 (C. A. 9) (1926-1929); *Murdoch v. Clark*, 53 F. 2d 155 (C. A. 1) (the 1920's); *United States ex rel. Yokinen v. Commissioner of Immigration*, 57 F. 2d 707 (C. A. 2) (the late 1920's); *Kjar v. Doak*, 61 F. 2d 566 (C. A. 7) (the late 1920's); *In re Saderquist*, 11 F. Supp. 525 (D. Me.), affirmed, 83 F. 2d 890 (C. A. 1) (1930-1935); *Harisiades v. Shaughnessy*, 187 F. 2d 137 (C. A. 2) (1925-1939); *United States v. Dennis*, 183 F. 2d 201 (C. A. 2) (1945-1948).

In the course of affirming the *Dennis* conviction (341 U. S. 494), in upholding the related deportation provisions in the same Alien Registration Act of 1940 (*Harisiades v. Shaughnessy*, 342 U. S. 580, see *supra*), in sustaining the anti-Communist affidavit requirement of the Taft-Hartley Act (*American Communications Ass'n v. Douds*, 339 U. S. 382), and in enforcing the deportation and bail provisions of the Internal Security Act of 1950 (*Carlson v. Landon*, 342 U. S. 524), this Court has recognized that the facts revealed by judicial trials and Congressional investigations beginning in 1931 (H. Rep. 2290, 71st Cong., 3d Sess.) down to date, when read in the light of recent political and military developments, and underscored by persistent espionage and other fifth

columar activity by Communists in this country and elsewhere on behalf of the Soviet Union, amply justify the conclusion of Congress that the Communist Party has advocated overthrow of the Government by force and violence. See also *Adler v. Board of Education*, 342 U. S. 485.³⁶

Years of administrative adjudications likewise stand behind the legislative findings embodied in the Internal Security Act in 1950. The Immigration and Naturalization Service estimates that from 1918 to September 1950 (when the Internal Security Act was passed) approximately 200 aliens were adjudged to be members of the Communist Party (or its predecessors or affiliates) and in each case the Party was administratively determined, under the deportation statute as it then read, to advocate the forcible overthrow of the Government.³⁷

³⁶ In *Schneiderman v. United States*, 320 U. S. 118, an attempt by the Government to denaturalize for fraud, the Court held that the evidence in the record as to the Communist Party's advocacy in 1927 of force and violence was not indisputable enough to meet the requirement that proof of fraud in naturalization be "clear, unequivocal, and convincing". But the Court specifically refused to pass for itself on the issue of the Party's advocacy of force (320 U. S. at 158), and declared that it was not deciding "what interpretation of the Party's attitude toward force and violence is the most probable on the basis of the present record, or that petitioner's [Schneiderman's] testimony is acceptable at face value." The case turned wholly on the special requirements of proof in denaturalization proceedings, and does not constitute an adjudication as to the true nature of the Communist Party. See *Yates v. United States*, 354 U. S. 298, 336-338.

³⁷ Almost half of these adjudications were in the period 1918-1926, and the other half in the period from 1921 to September 1950. There were about 75 such adjudications in the decade from 1930 to 1940.

These judicial and administrative findings are significant, not only because they give great weight and sanction to the legislative determination, but also because they indicate the smallness of the possibility that petitioner, or any other alien, could show that the Communist Party did not advocate force and violence. That theoretical choice is practically non-existent, and Congress has really done no more than eliminate the burden of introducing again and again in deportation proceedings evidence, documentary and oral, as to the Party's nature and activities.³⁸ By Section 22 Congress has substituted for a process of routine proof in individual cases a uniform rule based on its own investigations, prior judicial and administrative proceedings, and facts of current and past history known to all.³⁹

³⁸ See *Milasinovich v. The Serbian Progressive Club*, 369 Pa. 26, and *Albert Appeal*, 372 Pa. 13, in which the Supreme Court of Pennsylvania held that judicial notice may be taken of the fact that the Communist Party advocates the overthrow of the government by force. In the latter case, the court stated that (372 Pa. at 20-21):

It would seem almost an absurdity of legal procedure to continue to submit to various juries in individual cases a question so readily and authoritatively determinable from the mere perusal of the writings of the acknowledged founders and protagonists of the Communist movement: * * *.

³⁹ It is important to note that under the pre-1950 system (upheld in *Harisiades*) a finding by the immigration officials that the Communist Party advocated force, based on the usual documentary evidence and the testimony of one or more persons who were key members of the Party during the period of the alien's membership, would be upheld on *habeas corpus*, even though

4. *Congressional power, under the due-process clause, to deport specifically named classes of aliens.*—

As we have just shown (*supra*, pp. 55-56), legislative investigations and findings, judicial and administrative decisions, and common knowledge, all combine to reinforce Congress' determination in the 1950 Act that the Communist Party advocates, and has always advocated, forcible overthrow of the Government and that alien Communists should be deported. As in *Harisiades*—which itself refers explicitly to the connections of the Communist Party with force and with the Soviet Union (342 U. S. at 590-1) (see *supra*, p. 52)—Congress' view cannot be called a "fantasy or a pretense"; it cannot be said that "there were then or are now no possible grounds on which Congress might believe that Communists in our midst are inimical to our security" (342 U. S. at 590). That being so, the basic rationale of *Harisiades* (and its predecessor decisions) compels the upholding of Congress' deliberate choice to deport past and present Communists.

The practice of Congress, in the 1950 Act, of specifically naming the Communist Party, instead of continuing to use the more general classification of the 1940 Act which does not refer in terms to the

there was other evidence to the contrary. See *Tisi v. Tod*, 264 U. S. 131, *Bilokumsky v. Tod*, 263 U. S. 149, *Vajntaur v. Commissioner*, 273 F. S. 103, all affirming and applying the rule that the immigration officials' findings of fact must be upheld if supported by some evidence, even though the finding might be held erroneous on a *de novo* judicial appraisal.

Party, has support, as we have pointed out, in the history of the Party. It was upheld as to deportation of present Party members in *Carlson v. Landon*, 342 U. S. 524, 534-536 (*supra*, p. 51). The naming of the Communist Party in the oath provision of the Taft-Hartley Act was sustained in *American Communications Ass'n v. Douds*, 339 U. S. 382, and *Osman v. Douds*, 339 U. S. 846, 847.

The practice of designating a class by name also has the support of judicially-validated deportation precedents relating to other groups. *Fong Yue Ting v. United States*, 149 U. S. 698, 717, tells us that the root of the Chinese exclusion and deportation laws was the belief that "the presence within our territory of large numbers of Chinese laborers, of a distinct race and religion, remaining strangers in the land, residing apart by themselves, tenaciously adhering to the customs and usages of their own country, unfamiliar with our institutions, and apparently incapable of assimilating with our people, might endanger good order, and be injurious to the public interests * * *." See also *Wong Wing v. United States*, 163 U. S. 228, 237 ("aliens whose race or habits render them undesirable as citizens"). But Congress did not take the various components of these charges against the Chinese and fashion a general category of deportable aliens which would not mention the Chinese by name but was intended to cover them by its general description. Congress, as in this case, chose to specify instead of to generalize; it listed by name the class the bulk of whose members it found to be undesirable residents, even though it may be assumed

that there were individual Chinese who could plainly not be characterized as "strangers in the land". For many years, "anarchists" have been excluded by name and held deportable, and the Court has upheld the statute even as applied to one professing to be a philosophical anarchist "innocent of evil intent". *Turner v. Williams*, 194 U. S. 279, 294.⁴⁰

Also, in enacting Section 22, Congress was proceeding by conscious analogy⁴¹ to the Alien Enemy Act of 1798 which authorizes the deportation of Aliens who are nationals of a country at war with the United States or by which invasion of American territory is "threatened." As this Court noted in *Harisiades v. Shaughnessy*, 342 U. S. at 587:

War, of course, is the most usual occasion for extensive resort to the power. Though the resident alien may be personally loyal to the United States, if his nation becomes our enemy his allegiance prevails over his personal preference and makes him also our enemy, liable to expulsion or internment, and his property becomes subject to seizure and perhaps confiscation. But it does not require war to bring the power of deportation into existence or to

⁴⁰ In this connection, it is appropriate to recall the other general classes of aliens Congress has classified as deportable. See footnote 21, *supra*, p. 39. A survey of these categories will show instances in which persons who fall into a deportable class may well be individually and personally worthy. *E. g.*, Sections 241 (a) (3) and (8) of the 1952 Act, dealing with aliens who become public charges or are institutionalized at public expense for mental disease.

⁴¹ See S. Rep. 2230, 81st Cong., 2d Sess., pp. 16-17; *The Immigration and Naturalization Systems of the United States*, S. Rep. 1515, 81st Cong., 2d Sess., pp. 788-789.

authorize its exercise. Congressional apprehension of foreign or internal dangers short of war may lead to its use.

By the Alien Enemy Act, Congress conferred upon the President power to deport aliens who are nationals of a hostile country without regard to whether a particular alien had ever evidenced the slightest hostility to the interests of the United States.⁴² Presidential action under the Act is reviewable only upon the issue of whether the particular alien falls into the category of enemy aliens. *Ludecke v. Watkins*, 335 U. S. 160.

The Alien Enemy Act dealt with problems of internal security created by actual or threatened hostilities between national states and with the techniques of warfare which existed in the early 19th century. In 1950, Congress was dealing with the threat to the peace and security then and now confronting the United States. It has found that Communists everywhere have as their objectives the violent overthrow of non-Communist governments and serving the interests of the Soviet Union. It has found that the Communist movement here has been heavily laden with aliens and that Soviet control of the American Communist Party has been largely through alien Communists. *Supra*, pp. 59-63. It has concluded, in effect, that the possibilities of political violence and treachery, particularly in a time of crises, on the part of alien members of the

⁴² That the Fifth Congress which enacted the Alien Enemy Act did not regard the use of its powers over aliens to protect the security of the nation as limited to periods of actual war, is emphasized by the fact that the House twice rejected proposals to delete the words "or threatened". *Annals of Congress*, 5th Cong., 2d Sess., pp. 1786, 1792.

Communist Party are too great for the United States to assume the risks of attempting to distinguish between those members of the Party who have knowledge of and share its purposes, and those who do not, or of determining the sincerity of those who assert they have left the Party and rejected its principles. *Supra*, pp. 9-23, 44-50, 55-63.

If a statute passed during time of war specifically named the enemy countries whose citizens were to be detained or deported, it would be just as valid as if it referred to "enemies" generally, with precisely the same intention and meaning. For instance, if we were at war with the Soviet Union, or a war was threatened, Congress could specifically order the expulsion of nationals of that particular country. The Constitution certainly does not bar treating in the same way alien members of the organization which the past thirty years have demonstrated to be merely the *alter ego* of the aggressive Communist state. For, unlike the Alien Enemy Act, the applicability of Section 22 of the Internal Security Act of 1950 is determined, not by the accidents of birth and ancestry, but by an alien's voluntary membership in the Communist Party. As this Court said in *American Communications Association v. Douds*, 339 U. S. 382, 391:

The fact that the statute identifies persons by their political affiliations and beliefs, which are circumstances ordinarily irrelevant to permissible subjects of government action, does not lead to the conclusion that such circumstances are never relevant. * * * If accidents of birth and ancestry under some circumstances justify an inference concerning future conduct,

it can hardly be doubted that voluntary affiliations and beliefs justify a similar inference when drawn by the legislature on the basis of its investigations.

In Section 22 of the 1950 Act, Congress was not merely enacting into a "conclusive presumption" its legislative determination that the Communist Party advocated the forcible overthrow of the Government. Congress was not merely declaring that the Party fell within the previously-defined general class of organizations with unlawful objectives. Congress was also creating a new class of deportable aliens:—those belonging to an entity which both advocates violence and at the same time is, and has been, under the direction and control of the "Communist dictatorship of a foreign country." See Section 2 of the 1950 Act. The factor of control by the Soviet Union, stressed by the Committee on the Judiciary (see *supra*, pp. 59-62), is a factor new to our deportation legislation and cannot be disregarded. Only the Communist Party and its affiliates and associated groups fall within the new class, and Congress was therefore not singling out the Party for a special legislative "determination." In the Alien Enemy Act of 1798, the Congress adopted similar legislation providing for the removal of nationals of enemy countries or of nations which threatened invasion of this country or a "predatory incursion."

In sum, the overwhelming testimony received by Congress, confirmed by events of common knowledge, as to the purposes of the Communist Party and as to the major role played by aliens in organizing the

Party and keeping it under the control of the Soviet Union, demonstrates that Section 22 is not an unreasonable exercise of Congress' plenary powers over aliens in order to protect the security of the United States, and does not violate the due process clause. And the history of expulsion legislation is sufficient to prove that Congress is entitled to make this judgment for itself and need not remit to individual hearings the issues of the Communist Party's nature and tenets or the alien's knowledge of the Party's objectives.⁴³ See also *infra*, pp. 73-77 (on the *ex post facto* and attainder provisions of the Constitution).

C. THE DEPORTATION OF PAST COMMUNISTS DOES NOT VIOLATE THE EX POST FACTO OR BILL OF ATTAINDER PROVISIONS OF THE CONSTITUTION

1. *Ex post facto* clause.—The opinion in *Harisiades* addressed itself to the contention that retrospective deportation legislation violated the *ex post facto* clause, and determined that there was no such viola-

⁴³ The basic fallacy in the argument that due process is denied because no hearing is allowed on the nature of the Party is the failure to distinguish deportation from a criminal proceeding. The difference is pointed out clearly in the dissent in *United States v. Spector*, 343 U. S. 169, 174. Referring to a Chinese deportation case, Justice Jackson said in *Spector*, a criminal case (343 U. S. at 176, fn. 3):

That Court thereby made it clear that there is a great distinction between deportation itself and a deportation order that may be made the basis of subsequent criminal punishment. It is that distinction which we press for here. See also *Wong Wing v. United States*, 163 U. S. 228, discussed *infra*, pp. 75-76.

tion (see 342 U. S. at 593-596).⁴⁴ That ruling was reiterated in *Galvan* (347 U. S. at 531); *Marcello v. Bonds*, 349 U. S. 302, 314; *Lechmann v. Carson*, 353 U. S. 685, 690; and *Malcahey v. Catalanotte*, 353 U. S. 692, 694.

2. *Bill of attainder clause*.—Section 22 does not violate the bill of attainder provision of Article I, Section 9, Clause 3, of the Constitution, by specifically naming the Communist Party. See *Carlson v. Landon*, 342 U. S. 524, 535-6 (*supra*, p. 51). A bill of attainder is a legislative act which inflicts punishment without a judicial trial. *United States v. Lovett*, 328 U. S. 303, 315. As the Court has held again and again, deportation may be harsh, drastic, and severe, but it is not a criminal proceeding and it is not a punishment. *Carlson v. Landon*, 342 U. S. 524, 537; *Harisiades v. Shaughnessy*, 342 U. S. 580, 594-5.⁴⁵ The bill of attainder cases (*Cummings v. Missouri*, 4 Wall. 277; *Ex parte Garland*, 4 Wall. 333, and *Pierce v. Carskadon*, 16 Wall. 234), on which reliance is placed, have been explained by the Court as proceeding “from the view that novel disabilities there imposed upon citizens were really criminal penalties for which civil form was a disguise” and “have never been considered to govern deportation,” 342 U. S. at 595. And the specific holdings in *Harisiades*, *Marcello*, *Galvan*,

⁴⁴ For a detailed discussion of the *ex post facto* clause and retrospective legislation, see the Government's brief in *Harisiades* (Oct. Term, 1954, Nos. 43, 206, 264), at pp. 102-116.

⁴⁵ To the same effect, see *Mahler v. Eby*, 264 U. S. 32, 39; *Fong Yue Ting v. United States*, 149 U. S. 698, 709, 730; *Bugajewitz v. Adams*, 228 U. S. 585, 591; *Wong Wing v. United States*, 163 U. S. 228, 237.

Carson, Catalanotte, Mahler, and Bugajewitz, that deportation is not a punishment for the purpose of the *ex post facto* clause, also dispose of the contention that a deportation statute can be a bill of attainder which necessarily inflicts punishment. See the concurring opinion in *United States v. Lovett*, 328 U. S. at 323.

Moreover, deportation is one legislative field in which there is a long history of naming specific groups—especially the Chinese and the anarchists. See *supra*, pp. 67 ff. Of the Chinese deportation cases, *Wong Wing v. United States*, 163 U. S. 228, contrasting deportation of the Chinese and their punishment by imprisonment, most aptly demonstrates the inapplicability of the bill of attainder clause to deportation. A resident alien Chinese was summarily sentenced to 60 days at hard labor and then ordered deported, under the statute involved in *Fong Yue Ting v. United States*, *supra*, 149 U. S. 698 (discussed *supra*, pp. 27, 29–30, 34–35), for having been found in the United States without a certificate of residence. The sentence of imprisonment was condemned as punishment without a judicial trial. “It is not consistent with the theory of our government that the legislature should, after having defined an offense as an infamous crime, find the fact of guilt and adjudge the punishment by one of its own agents.” 163 U. S. at 237. See *United States v. Spector*, 343 U. S. 169, 174–177 (Jackson J., dissenting). But the deportation of Chinese was upheld, following *Fong Yue Ting*. “No limits can be put by the courts upon the power of Congress to protect, by summary methods, the country

from the advent of aliens whose race or habits render them undesirable as citizens, or to expel such if they have already found their way into our land and unlawfully remain therein." 163 U. S. at 237. Deportation was not to be considered as punishment.

Even if, despite this history and the Court's prior rulings, each deportation provision is to be individually tested to see whether it is an attempt to inflict punishment, Section 22 is valid. *Harisiades* establishes that there is a sufficient connection between past membership in a subversive organization and present desirability as a resident for Congress to take action to expel such aliens, not as punishment but in order to rid the country of a potential threat. 342 U. S. at 590-1, 595-6. That is what Congress sought to do in the 1940 Act and also in the 1950 legislation. The legislative history of both statutes establishes without doubt that Congress thought the residence in this country of aliens who had previously been members of a subversive group was undesirable and dangerous. *Supra*, pp. 9-23, 44-50, 55-63. There was no purpose or attempt to punish. The history of the provision extends over a period of more than 30 years and this history shows that it is a direct method of accomplishing the Congressional objective of terminating the residence of such aliens, not an indirect attempt to reach some other result. Certainly, five distinct Congresses, in 1918, 1920, 1940, 1950, and 1952, would not have entertained improper motives. It cannot therefore be said that this law was enacted, as were the Civil War statutes and the one involved in *United States v. Lovett*, 328 U. S. 303, to punish ascertained

individuals or classes. Rather, it is a deliberate Congressional judgment that a particular class of aliens represents a danger to the welfare of the country and that its license to remain here should be revoked. Cf. *Hawker v. New York*, 170 U. S. 189, 196-7.

D. THE DEPORTATION OF PAST COMMUNISTS SUCH AS PETITIONER DOES NOT VIOLATE THE FIRST AMENDMENT

The claim is made that Section 22 violates the First Amendment. The authoritative answer is given, once again, by the *Harisiades* decision (342 U. S. at 591-2). The Court said that "the test applicable to the Communist Party has been stated too recently [in *Dennis v. United States*, 341 U. S. 494] to make further discussion at this time profitable." Petitioner was a member of the Communist Party, and his case is therefore precisely the same as *Harisiades*.

CONCLUSION

For the reasons stated in our brief on the original argument, and in this brief, it is respectfully submitted that the judgment of the court below should be affirmed:

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In the Supreme Court of the United States

OCTOBER TERM, 1956

CHARLES ROWOLDT, PETITIONER

v.

J. D. PERFETTO, ACTING OFFICER IN CHARGE, IMMI-
GRATION AND NATURALIZATION SERVICE, DEPARTMENT
OF JUSTICE, ST. PAUL, MINNESOTA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 34

CHARLES ROWOLDT, PETITIONER

v.

J. D. PERFETTO, ACTING OFFICER IN CHARGE, IMMIGRATION AND NATURALIZATION SERVICE, DEPARTMENT OF JUSTICE, ST. PAUL, MINNESOTA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the Court of Appeals (R. 38-41) is reported at 228 F. 2d 109. The opinion of the District Court appears at pages 35-38 of the record.

JURISDICTION

The judgment of the Court of Appeals was entered December 22, 1955 (R. 41). The petition for a writ of certiorari was filed February 9, 1956, and was granted on March 26, 1956 (R. 42), 350 U. S. 993. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the order for the deportation of petitioner as one who, after entry, had been a member of the Communist Party is based on evidence showing more than nominal membership in the Party.

2. Whether this Court's decision in *Galvan v. Press*, 347 U. S. 522, should be overruled.

STATUTES INVOLVED

Section 22 of the Internal Security Act of 1950, 64 Stat. 1006, 1008, provided in part as follows:

That any alien who is a member of any one of the following classes shall be excluded from admission into the United States:

* * * *

(2) Aliens who, at any time, shall be or shall have been members of any of the following classes:

* * * *

(C) Aliens who are members of or affiliated with (i) the Communist Party of the United States * * *.

Section 4 under the aforesaid Section 22 provides in part:

(a) Any alien who was at the time of entering the United States, or has been at any time thereafter, * * * a member of any one of the classes of aliens enumerated in section 1 (2) of this Act, shall, upon the warrant of the Attorney General, be taken into custody and deported in the manner provided in the Immigration Act of February 5, 1917. The provisions of this section shall be applicable to the

classes of aliens mentioned in this Act, irrespective of the time of their entry into the United States.¹

Section 1 of the Act of March 28, 1951, 65 Stat. 28, 8 U. S. C. [1946 ed., Supp. V] 137-9, provided as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Attorney General is hereby authorized and directed to provide by regulations that the terms "members of" and "affiliated with" where used in the Act of October 16, 1918, as amended, shall include only membership or affiliation which is or was voluntary, and shall not include membership or affiliation which is or was solely (a) when under sixteen years of age, (b) by operation of law, or (c) for purposes of obtaining employment, food rations, or other essentials of living, and where necessary for such purposes.

STATEMENT

Petitioner seeks reversal of the judgment of the Court of Appeals (R. 41) affirming the dismissal by the District Court for the District of Minnesota of his petition for a writ of habeas corpus in which he attacked the validity of an order directing his deportation on the ground that he is an alien who, after

¹ These provisions were repealed by Section 403 (a) (16) of the Immigration and Nationality Act of June 27, 1952 (66 Stat. 163, 279). The 1952 Act recodified and reenacted these provisions without material change. See Section 241 (a) (6) (C), 66 Stat. 204, 8 U. S. C. 1251 (a) (6) (C).

entry, had been a member of the Communist Party (R. 1-3).

The immigration file, which was annexed to respondent's return (R. 3-8) and is part of the record, shows that petitioner, who was born in Germany in 1883, entered the United States for permanent residence in 1914 and last entered the United States in 1924 (R. 9, 12, 17). In 1936, he was ordered deported on the ground that he was a member of an organization (the Communist Party) which advocated the overthrow of the government by force and violence, but the order was not executed. The proceedings were cancelled in 1942 on the authority of *Kessler v. Strecker*, 307 U. S. 22, for the reason that petitioner was not shown to have been a member of the Party at the time of the hearing (see R. 9-10).

In 1948, after past membership in an organization advocating the violent overthrow of the government had been made a ground of deportation by the Act of June 28, 1940 (54 Stat. 673), petitioner was served with a warrant charging him with having been affiliated with such an organization (R. 16). Hearings under the warrant were invalidated by reason of the decision of this Court in *Wong Yang Sung v. McGrath*, 339 U. S. 33, that deportation hearings must be conducted in accordance with the Administrative Procedure Act (R. 16). After Congress, by a rider to the Appropriation Act of 1951 (64 Stat. 1044, 1048), exempted deportation hearings from the Administrative Procedure Act, a new hearing was commenced on February 16, 1951. On that date, an

additional charge was lodged against petitioner under Section 22 of the Internal Security Act of 1950 (*supra*, pp. 2-3) charging him with having been, after entry, a member of the Communist Party of the United States (R. 10, 17). The hearing was then adjourned to March 28, 1951, to allow petitioner time to meet the additional charge (R. 18). At the conclusion of the adjourned hearing, the hearing officer found petitioner deportable as an alien who had been, after entry, a member of the Communist Party (R. 16-20). His recommendation was approved by the Assistant Commissioner (R. 10, 11-15) and an appeal to the Board of Immigration Appeals was dismissed, the Board concluding that the evidence supported the finding of membership in the Communist Party (R. 9-11).

The evidence of petitioner's membership rests for the most part on sworn testimony by petitioner himself before an immigration inspector on January 10, 1947. After the inspector had warned petitioner that anything he said might be used against him and petitioner had made statements, not under oath, to the effect that he wanted to return to Germany and for that reason had not fought very hard on his unsuccessful petition for naturalization (R. 20-23), petitioner agreed to give testimony under oath. After being sworn, he stated that he joined both the Communist Party and the Workers Alliance in the spring or early summer of 1935. While in the Communist Party, he paid dues (R. 26) and attended Communist Party meetings where the members talked about

"fighting for the daily needs". (R. 31). He gave as his reason for joining the fact that the Communist Party (R. 26) "had one aim—to get something to eat for the people" and that (R. 31) "everybody around me had the idea that we had to fight for something to eat and clothes and shelter". He further explained his joining the Party as follows (R. 31):

We had to go and ask those who had it—that was the courthouse at that time. We petitioned city, state and national government. We did and we succeeded. We finally got unemployment laws and a certain budget. Even at the few communist meetings I attended, nothing was ever said about overthrowing anything. All they talked about was fighting for the daily needs. * * *

When asked whether he was an active worker in the Communist Party, he replied "The only active work I did was running the bookstore for a while" (R. 28). The following then ensued (R. 28-29):

Q. Did you own the bookstore?

A. No, I didn't get a penny there.

Q. What was the arrangement there?

A. I was kind of a salesman in there, but the Communist Party ran it.

Q. You secured this employment through your membership in the Communist Party?

A. Yes.

Q. Was this store an official outlet for communist literature?

A. Yes.

Petitioner dropped out of the Communist Party when he was arrested under the first deportation

warrant about the end of 1935 (R. 26).² He remained in the Worker's Alliance "probably a couple of years longer" until that organization dissolved itself. While a member of the latter organization, he served on its executive board and occasionally served as secretary for a local unit (R. 26).

An order directing petitioner's deportation was issued on April 16, 1952 (R. 33-34). In March, 1955, after petitioner had been taken into custody for immediate deportation to Germany, the petition for habeas corpus was filed (R. 1-3).³

In dismissing the petition, the District Court held that the evidence produced at the hearing sustained petitioner's deportability under the definition of membership laid down by this Court in *Galvan v. Press*, 347 U. S. 522 (R. 35-38).⁴ The Court of Appeals, in

² Petitioner states in his brief (Pet. Br. 21) that he was a member of the Communist Party only "about six months". In his sworn statement to the Immigration and Naturalization Service when asked whether he was a member for "approximately one year" he answered (R. 26), "Yes, probably something like that". He had previously testified however that he joined the Party (R. 25) "in the spring or summer of 1935" and was a member (R. 26) "from then or until I got arrested and that was at the end of 1935."

³ After the original petition for habeas corpus was filed, a supplemental petition alleged, as an additional reason for a stay of deportation, that petitioner had applied to the Board of Immigration Appeals for vacation of the order of deportation in order to enable him to apply for suspension of deportation (R. 37). That motion, we are informed, was denied by the Board of Immigration Appeals in June, 1955, after the judgment of the District Court in this proceeding.

⁴ The original petition for habeas corpus challenged generally the constitutionality of the order of deportation and the propriety of the procedures (R. 1-3). After the hearing on an order to

affirming the order of the District Court, held that there was "an adequate evidentiary basis for the finding that Rowoldt was a member of the Communist Party in 1935"; and that like Galvan (347 U. S. at 529) "the record does not show a relationship to the Party so nominal as not to make him a 'member' within the terms of the Act" (R. 41).

SUMMARY OF ARGUMENT

I

This Court in its opinion in *Galvan v. Press*, 347 U. S. 522, upheld the constitutionality of Section 22 of the Internal Security Act of 1950, *supra*, pp. 2-3, as applied to an alien who had voluntarily joined the Communist Party, after entry, without proof that the alien "had joined the Party with full appreciation of its purposes and program" (*Ibid.*, p. 526). The opinion, however, contains a caveat on the nature of "membership," based on congressional discussion at the time of the enactment of Section 1 of the Act of March 28, 1951, *supra*, p. 3, seeking to clarify for administrative purposes the scope of the term "members of" as used in Section 22. The Court observed that Congress had not intended to include within that term those aliens who had joined the Communist Party when they were children, or who had become members by operation of law, or had joined "to obtain the necessities of life", or those

show cause why the writ should not issue, the District Court permitted petitioner to amend his petition to raise specifically the question of the sufficiency of the evidence to support the order of deportation (R. 34-35).

"who, accidentally, artificially, or unconsciously in appearance only, are found to be members of or affiliated with an organization of whose platforms and purposes they have no real knowledge". Petitioner erroneously attempts to bring his case within that caveat on the ground that his motivation in joining the Communist Party was economic necessity and that, in seeking to bring about economic reforms through Communist Party action, he was unaware that the Party operated as a distinct political organization.

A. First, it is evident that petitioner was aware that he was joining the Communist Party as such. There is no suggestion in the record, and petitioner does not now argue, that he mistook the Communist Party for any other organization, such as the Workers Alliance in which he was also an active member and an officer. As a member, moreover, he assumed an active role in local Party activities, being selected by the Party soon after joining to operate its bookstore and to sell Communist literature. He participated in Communist meetings and his knowledge of the basic tenets of Communism, apparently relating back to the period of his membership, is evidenced in numerous instances throughout his sworn statement.

B. Second, it is apparent that petitioner did not join the Party under duress or for reasons of personal economic necessity. Aside from his admission that he worked for the Communist Party in a significant local position without remuneration, his statements in the record indicate that he joined the Party to seek

ultimate economic benefits to society generally through governmental reforms. This is not the type of personal economic compulsion which Congress intended should excuse Communist Party membership from the reach of Section 22 of the Internal Security Act of 1950. The legislative history of Section 22, as well as the congressional comments at the time Congress enacted the Act of March 28, 1951, *supra*, p. 3, make it clear that Congress considered as involuntary only the membership of those aliens, principally "Iron Curtain" emigres, who had been coerced to join Communist organizations in their own countries for compelling economic reasons and as a minimum condition of subsistence.

Petitioner is clearly not of that category. He freely joined the Communist Party in a country and under conditions which did not make such membership a condition for employment. He apparently received no personal material benefit from the Party whatsoever, but rather volunteered his services for general political purposes and left the Party only to avoid threatened deportation.

C. Third, petitioner now contends for the first time that he joined the Communist Party unaware that it operated "as a distinct and active political organization" and that he had no real knowledge of its "platform and purposes". While he does not dispute that he knew that he was joining the Communist Party as such, his position seems to be that his interest in joining was only to further the immediate economic program of the Party. His knowledge of the Com-

munist classics, his activity in running the Party bookstore, his participation in Communist Party meetings, his statement that he joined the Party to seek economic reforms through methods constituting political action, and his further statement that since he had known the Communist Party they had been striving "to set up an economic system to get the people out of a monopoly control on to their own economic feet", all show that he had not mistaken the Party for a social agency and was not oblivious of its character as a political entity.

In any event, as this Court held in its *Galvan* decision in response to a similar contention by that petitioner (347 U. S. at 526), awareness of the Communist Party's purposes and program is not an essential condition of deportability under Section 22. Even under the Alien Registration Act of 1940, it was not incumbent on the government to prove, in addition to membership in an organization advocating overthrow of the United States by force and violence, that alien members had subscribed to the political objectives of such an organization.

D. Fourth, petitioner argues that the brief period of his membership, the asserted unimportance of his activities for the Party, and the meritorious objectives and purposes which he says he hoped to achieve show—in totality—that his membership was "nominal". Congress did not, however, intend that "membership" within the meaning of Section 22 depend on the extent and duration of the alien's activities in and for the Communist Party. During consideration of

the 1951 clarifying legislation (*supra*, p. 3), it was recognized that an exception might exist where aliens passed from one organization (*e. g.*, the Socialist Party) into a proscribed one (*e. g.*, the Communist Party) supposing the change to be a mere change of name (the situation involved in *Colyer v. Skeffington*, 265 Fed. 17; 72 (D. Mass.), cited in the legislative record as an instance of accidental, artificial, or unconscious membership). But petitioner was not that kind of member. He, like Galvan, joined the Communist Party with knowledge that he was joining that specific organization, and no other, and "of his own free will". 347 U. S. at 528.

E. There is therefore no basis for remanding this case for further administrative proceedings. It is not denied that petitioner did join the Communist Party, that he knew it to be such, that he attended meetings, ran its bookstore, and finally resigned only because of fear of deportation. Unlike the case of *Garcia v. Landon*, 348 U. S. 866, the record is in no respect equivocal as to these controlling facts. Rather, the case is like *Galvan* in which remand was not ordered.

Furthermore, petitioner made no claim to the immigration authorities that his admitted membership was merely nominal and it cannot be assumed that they would have failed to consider his claim had it been fairly presented or had the facts justified its consideration otherwise. While this Court's *Galvan* decision had not been rendered at the time of petitioner's hearing, that decision did not read new mean-

ing into the terms "members of" in the context of Section 22, but adopted the meaning given that term by Congress, a term which, by the time of petitioner's hearing, had not only been clarified by the Act of March 28, 1951 (*supra*, p. 3) but by a new regulation of the Immigration and Naturalization Service. The issues belatedly raised by petitioner do not depend upon the resolution of conflicting facts, but raise solely a question of law on undisputed facts.

II

In his petition for a writ of certiorari, petitioner suggested without elaboration that there are additional constitutional issues in this case not covered by this Court's *Galvan* decision. In his brief, however, he does not pursue this argument but seeks to reargue the broader constitutional issues which were before this Court, not only in the *Galvan* case, but also in *Harisiades v. Shaughnessy*, 342 U. S. 580.

All of the issues raised by petitioner have been recently and exhaustively considered by this Court in the *Galvan* and *Harisiades* cases, and comprehensive briefs analyzing both the precedents and the legislative background of this type of deportation legislation were submitted to this Court by the government. The Court, moreover, has indicated in two more recent opinions (*Jay v. Boyd*, 351 U. S. 345, 348; *Marcello v. Bonds*, 349 U. S. 302, 314) its adherence to its *Galvan* and *Harisiades* rulings. While the Court may sometimes feel called upon to reconsider past constitutional decisions—in the light of new facts,

changing history, or recent developments in constitutional principles—the issues raised in this case have been recently settled after intensive scrutiny of the special problem involved. Petitioner presents nothing new, and there is nothing to evoke a third reconsideration of those issues.

While for these reasons we shall not reargue here our position as to the constitutionality of Section 22, or the validity of this Court's reasoning sustaining that position in the *Galvan* case, it is appropriate to point out that petitioner erroneously conceives that case to hold that "Congress may expel aliens for causes which have no rational relationship to their desirability as residents, and which may be wholly arbitrary, whimsical, or worse". The opinion did not establish any such broad ruling. The Court observed that Congress had formulated its policy toward alien Communists after "extensive investigation" and on the basis of the legislative findings incorporated in Section 2 (4) of the Internal Security Act, and the Court then concluded that it could not judicially determine that the legislative classification is so baseless as to be violative of due process, particularly because such determinations are peculiarly concerned with the political areas of government. Petitioner's arguments seeking to impeach the factual premises on which Congress acted do not justify judicial reevaluation of its conclusions; and his discussion of the severity of the legislation presents a factor not pertinent to the Court's function in passing on statutes of this

PETITIONER WAS MORE THAN A NOMINAL MEMBER OF THE
COMMUNIST PARTY

In *Galvan v. Press*, 347 U. S. 522, this Court upheld the constitutionality of Section 22 of the Internal Security Act of 1950, *supra*, pp. 2-3, providing for the deportation of any alien who has been a member of the Communist Party at any time after entry, as applied to a past member of the party, without proof that the alien "had joined the Communist Party with full appreciation of its purposes and program" (347 U. S. 526). The Court said, 347 U. S. at 528:

It must be concluded, therefore, that support, or even demonstrated knowledge, of the Communist Party's advocacy of violence was not intended to be a prerequisite to deportation. It is enough that the alien joined the Party, aware that he was joining an organization known as the Communist Party which operates as a distinct and active political organization, and that he did so of his own free will. A fair reading of the legislation requires that this scope be given to what Congress enacted in 1950, however severe the consequences and whatever view one may have of the wisdom of the means which Congress employed to meet its desired end.

The opinion, however, contains a caveat on the nature of membership (347 U. S. at 526-528):

While the legislative history of the 1950 Act is not illuminating on the scope of "member,"

considerable light was shed by authoritative comment in the debates on the statute which Congress enacted in 1951 to correct what it regarded as the unduly expanded interpretation by the Attorney General of "member" under the 1950 Act. 65 Stat. 28. The amendatory statute dealt with certain specific situations which had been brought to the attention of Congress and provided that *where aliens had joined a proscribed organization* (1) when they were children, (2) by operation of law, or (3) *to obtain the necessities of life, they were not to be deemed to have been "members."* In explaining the measure, its sponsor, Senator McCarran, stated repeatedly and emphatically that "member" was intended to have the same meaning in the 1950 Act as had been given it by the courts and administrative agencies since 1918, 97 Cong. Rec. 2368-2374. See S. Rep. No. 151, 82d Cong., 1st Sess. 2; H. R. Rep. No. 118, 82 Cong., 1st Sess. 2. To illustrate what "member" did not cover he inserted in the Record a memorandum containing the following language quoted from *Colyer v. Skeffington*, 265 F. 17, 72: "Congress could not have intended to authorize the wholesale deportation of aliens who, accidentally, artificially, or unconsciously in appearance only, are found to be members of or affiliated with an organization of whose platform and purposes they have no real knowledge." 97 Cong. Rec. 2373.

Petitioner's first endeavors to bring his case within his caveat on the ground that his motivation in joining the Party was economic necessity and that, in seeking to bring about economic reforms through

Communist Party action, he was unaware that the Party operated as a distinct political organization. But this argument is refuted by the record which shows that, as an educated and articulate alien,³ he was aware that he was joining the Communist Party as such; that he joined, not out of his own economic necessity, but to participate in its activities; and that he did actively participate in the councils of the Party and in operating its bookstore in Minneapolis. He was more than a nominal member.

A. PETITIONER WAS AWARE THAT HE WAS JOINING THE COMMUNIST PARTY

Petitioner freely admitted that in the spring or early summer of 1935 he joined both the Communist Party and the Workers Alliance. There is no suggestion and petitioner does not even urge that he did not know the difference between the two organizations. He himself explained the different methods of paying dues in each organization, and further stated that he left the Party at the time of his first arrest for deportation at the end of 1935, but continued not only as an active member of the Alliance but as a member of its executive board and occasionally as secretary for one of its locals prior to its dissolution some two years later (R. 25-26).

While he terminated his membership in the Communist Party at the end of 1935 because of pending deportation proceedings, he was by no means merely a nominal or even passive member while he was in

³ He testified that his education included "something like high school in Germany" (R. 32).

the Party. As a Communist Party member he was chosen by the Party to operate its bookstore in Minneapolis, Minnesota, which was an official outlet for Communist literature operated by the Party to distribute such party-line classics as the works of Strachey, Marx, Lenin, and other writers. In addition, his acquaintance with the Communist classics, apparently relating back to the period of his membership, is evidenced in his sworn statement (*e. g.*, R. 27, 28, 31). He attended party meetings where party policy in regard to the economic situation was discussed (R. 31), and when asked whether his "beliefs in government have changed during the past ten years" he replied (R. 30-31), "Yes, it has changed to that extent—that I began thinking for myself instead of following somebody else telling me things." He thus was well aware that the organization which he joined was the Communist Party.*

B. PETITIONER'S MEMBERSHIP IN THE COMMUNIST PARTY WAS
VOLUNTARY

While petitioner seeks to explain his membership as motivated by dire personal economic necessity, the fact that he received no pay for his voluntary work

* Petitioner does not challenge the right of the immigration authorities to rest their findings and the warrant of deportation on his own voluntary admissions, and it has been held that this can be done. *Schoeps v. Carmichael*, 177 F. 2d 391 (C. A. 9), certiorari denied, 339 U. S. 914; *Navarrette-Navarrette v. Laadon*, 223 F. 2d 234 (C. A. 9), certiorari denied, 351 U. S. 911. Cf. Wigmore, *Evidence* (3rd ed.), Sec. 1048; A. L. I., *Model Code of Evidence* (1942), p. 245; *Wong Kiu Faan v. Brownell*, 218 F. 2d 444, 446 (C. A. 9); *Milton v. United States*, 110 F. 2d 556, 560 (C. A. D. C.); *United States v. United Shoe Machinery Corp.*, 89 F. Supp. 349, 351-2 (D. Mass.).

for the Party (*c. g.*, (R: 28), "No, I didn't get a penny there") disproves his contention. And while he metaphorically replied, when asked why he joined the Party (R. 31), "we wanted something to eat and something to crawl into", he then explained this statement as follows (R. 31):

We had to go and ask those who had it—that was the courthouse at that time. We petitioned city, state and national government. We did and we succeeded. We finally got unemployment laws and a certain budget. Even at the few communist meetings I attended, nothing was ever said about overthrowing anything. All they talked about was fighting for the daily needs. That is why we never thought much of joining those parties in those days.

In response to a similar question earlier, he had replied (R. 26):

The purpose was probably this—it seemed to me that it came hand in hand—the Communist Party and the fight for bread. It seemed to me like this—let's put it this way—that the Communist Party and the Workers' Alliance had one aim—to get something to eat for the people. I didn't know it was against the law for aliens to join the Communist Party and the Workers' Alliance. I found that out when Mr. Adams told me.

It is apparent therefore that petitioner was not one who turned in desperation to the Communist Party "for purposes of obtaining employment, food rations, or other essentials of living" within the meaning of the Act of March 28, 1951, Sec. 1, *supra*, p. 3. Pe-

itioner claimed only that he was drawn to the Communist Party because of his notion that the Party was the appropriate channel through which to seek social reforms, and through which to secure ultimate economic benefits to society generally. This rationale for the employment of Marxian methods is the central theme of all Communist thinking. It is not the type of personal economic compulsion to which the clarifying amendment of the 1951 Act was directed.

This conclusion, clear enough from the language of the 1951 Act, is fortified by consideration of the Act's legislative background. Following passage of the Internal Security Act of 1950, some disagreement arose as to the meaning of the term "member" within the context of Section 22. The Attorney General, in administering the exclusion provisions of the immigration laws, took the position that the term was to be strictly and literally applied under the new legislation, regardless of the fact that the alien might have been compelled to join a totalitarian party in his country of origin to obtain food rations and subsistence. The State Department took the position that the term "members" should be interpreted as it had been understood prior to enactment of the 1950 legislation, so as not to include those cases where the alien's membership was involuntary or purely nominal. This impasse resulted in a situation where the State Department either had to refuse immigrant visas to aliens within the disputed categories or grant them permanent visas only to have the aliens either excluded on arrival or admitted only temporarily

clarifying legislation in 1951, 2,400 persons were

under the contrary interpretation of Section 22 by the Department of Justice. H. Rep. 118, 82d Cong., 1st Sess., p. 1; S. Rep. 111, 82d Cong., 1st Sess., p. 2; 97 Cong. Rec. 2370, 2374. Prior to the enactment of ~~scribed organizations, of whom nine-tenths were~~ temporarily excluded because of membership in proscribed organizations, of whom nine-tenths were nominal or involuntary. *Annual Report of the Attorney General* (1951), p. 449.

The inconsistency in interpretation of the terms "members of" is illustrated in the following excerpt from a memorandum inserted in the record by Senator McCarran during debate on the Act of March 28, 1951 (*supra*, p. 3), which resolved the administrative conflict (97 Cong. Rec. 2373):

"2. Administrative interpretation: The Peoples' Front of Yugoslavia, known as the Narodni Front, at its third conference in April 1949, declared itself to be a political entity of the Communist Party of Yugoslavia.

"Although the administrative authorities have ruled that the Narodni Front of Yugoslavia is a subversive organization, within the purview of the act of October 16, 1918, membership by an alien in which organization would make the alien excludable, the Department of State ruled that membership in the Narodni Front which was induced for the purpose of obtaining food rations, job or housing permits, was not the type of membership contemplated by the act of October 16, 1918, so as to work an exclusion of aliens so induced unless the aliens also had an ideological affinity for the organization or were Communists in fact. The Department of Justice has admitted into the United States a number of aliens who obtained visas under this ruling.

"It is puzzling to me that the administrative authorities would rule that aliens who joined a Communist organization allegedly to procure economic benefits are not excludable from the United States as 'members' of a subversive organization, but that Basque sheepherders who fought against the Communists are excludable because a Spanish law made them members of a subsidiary of the Spanish Falange, which they have never joined and in whose activities they have never taken part."

Since the sponsors of the Internal Security Act of 1950 and various interested committees of both houses concurred in the more liberal interpretation given the term "members of" by the State Department (97 Cong. Rec. 2371), various bills were introduced to procure the issuance of correcting regulations by the Attorney General. The original bills reported out of the House and Senate Judiciary Committees (H. R. 2339; S. 728) would have, by virtue of a limiting clause, excepted from the term "members" in Section 22 only aliens who joined a *non-Communist* proscribed organization (1) when they were children, (2) by operation of law, or (3) "for purposes of obtaining employment, food rations, or other essentials of living, and where necessary for such purposes." These bills would have had the effect of barring from admission to the United States even involuntary members of Communist organizations, without exception. During debate, the inconsistency of denying the escape provisions to involuntary members of Communist organizations, particularly those who had lived in Communist-dominated countries, was pointed out by Senator Lehman and others (97 Cong. Rec. 2372, 2380, 2383), and correspondence was inserted in the record to show that such policy would have an adverse effect on the displaced persons program and on further emigra-

* In a detailed summary of conditions in the Soviet-dominated countries prepared by the Displaced Persons Commission in connection with the proposed legislation (97 Cong. Rec. 2376-2380), it was pointed out that it was practically impossible to exist in the Soviet Union without belonging to some organization created, dominated, or controlled by the Communists (*Ibid.*, p. 2380), and that much the same situation prevailed in other satellite states, as

tion from the "Iron Curtain" countries. 97 Cong. Rec. 2376-2383. To correct this deficiency, the limiting clause was removed from the legislation, on motion from the floor by Senator Ferguson (97 Cong. Rec. 2368, 2374).

During the floor debate, the following discussion occurred between Senator Nixon and Senator McCarran of the Senate Judiciary Committee (97 Cong. Rec. 2369-2370):

Mr. NIXON. I think so far as the term "membership" is concerned, that when that term was written into the Internal Security Act of 1950 the Congress intended that membership, by its very nature, should be voluntary.

Mr. McCARRAN: That is correct.

Mr. NIXON. Prior to 1950, "membership" had been interpreted by the Justice Department and by the State Department in exactly that way. Unless membership is voluntary, it was not presumed that a person was a member of a certain organization. After the passage of the act, however, a new interpretation was given, and any membership, even nominal membership, and even though it was the result of duress or various circumstances covered by the

for instance the Ukraine, where the situation was described as follows (*Ibid.*, p. 2379):

"Workers in the industrial centers of the Ukraine were required to belong to so-called Soviet trade-unions in order to secure work. Here again these trade-unions are not free, but are completely under the domination and control of the Soviet Government. All phases of life in the Ukraine were under the control of the Soviets, and it was practically impossible to exist without belonging to one or several of the organizations created by, or dominated and controlled by, the Soviet regime."

amendment which the Senator from Nevada has offered, was held to be membership, was it not?

Mr. McCARRAN. It was so held.

Mr. NIXON. All we are doing by this amendment is to instruct the Department of Justice, in effect, to interpret the word "membership" as it had previously been interpreted prior to 1950, and as the Congress intended and expected it would be interpreted when the law was passed. Is that not correct?

Mr. McCARRAN. It was so considered and was so written into the law by the committee which handled the bill, and by the conference committee as well.

Later, in explaining the legislation, Senator McCarran said (*Ibid.*, pp. 2370-2371):

The third general group—and again, substantial numbers of spouses of members of the United States Armed Forces are included—*consists of aliens who were forced to become members of totalitarian organizations in order to obtain food ration cards, housing, employment, and other essentials of living. [Emphasis added.]*

This class of cases is taken care of by the phrase lettered (c), which, read in context, provides that the terms "members of" and "affiliated with" shall not include "membership or affiliation which is or was solely * * * (c) for purposes of obtaining employment, food rations, or other essentials of living, and where necessary for such purposes."

Aside from the above italicized language there is other cogent evidence in the debates that the third

escape provision related only to aliens who had been "forced to become members of totalitarian organizations" in order to procure the "essentials of living", principally in totalitarian countries. The following comments were made after Senator Ferguson introduced his amendment to extend the category of exceptions listed in the proposed bill to include nominal Communist Party "members" (97 Cong. Rec. 2368, 2369):

Mr. McCARRAN. Mr. President, the effect of the amendment the Senator offers would be to let down the bars with respect to Communists who could establish that their membership in or affiliation with a Communist organization was involuntary, having been during infancy, or by operation of law, or for purposes of obtaining employment, food rations, or other essentials of living, and where necessary for such purposes.

Mr. FERGUSON. That is correct; the amendment would exclude all those who were Communists by conviction, what we might call mentally Communist. But it would not exclude those who really, in effect, never have been what I call mentally Communist—those whose Communist affiliation was nominal or involuntary.

* * * * *

Mr. AIKEN. To what extent are there involuntary members of the Communist Party? We know there were involuntary members of the Fascist and certain other extreme right-wing parties; but are there involuntary members of the Communist Party?

Mr. McCARRAN. We are advised that there are, and we are advised that many of them now

entirely renounce any principle of the Communist Party, because they were forced into it. I refer to the group of those who may have been forced into the party by dint of laws or regulations or conditions under which they existed, or because they were immature children at the time when they were forced in.

* * * * *

Mr. SMITH of New Jersey. That is the first question. Would the pending bill exclude, for instance, a Ukrainian who lived in the Soviet Union and who was forced to belong to a Kulak farm cooperative in order to obtain work. Would such a man be excluded?

Mr. McCARRAN. If he were not a Communist but was forced into that so-called union in order to obtain work, it would not exclude him.

Also, in discussing the error of the Department of Justice's interpretation of the term "members of" in visa and exclusion cases, Senator McCarran said (97 Cong. Rec. 2370):

* * * Many of these cases involve spouses of servicemen who have been denied visas or admission into the United States *on the basis of some instance of involuntary membership or affiliation*, such as a membership or affiliation which occurred at tender years, by operation of law, or for purposes of obtaining employment, food, rations, and the like. * * * [Emphasis added.]

These extracts from the Senate debates on the 1951 clarifying legislation show a congressional purpose to include within the phrase "members of" all aliens

who joined the Communist Party of their own free will, and to exclude only those who joined under such duress or misapprehension of facts as to make their membership truly involuntary. The examples given of those who should be exempted from the general ban involved aliens who, while living in Fascist, Nazi, and Communist dictatorships, joined proscribed organizations because the price of nonconformity was death, imprisonment, or severe economic sanctions.⁹

This petitioner, on the other hand, voluntarily joined the Party in a country and under conditions which did not make such membership a minimum condition for employment or subsistence. He was not a child, but an adult 51 years old. He was more than a passive joiner. He worked for the Party organization in a post of some significance—salesman in the Party bookstore in a metropolitan center—without compensation to himself, and left the Party only because his continued membership jeopardized his continued residence in this country. So far as the record shows, he received no personal material benefit from the Communist Party whatsoever. Certainly, therefore, it cannot be said that he either joined or remained in the Party by virtue of any conditions imposing such economic duress as would make his

⁹ Senators Aiken and Nixon adverted to the fact that the Communist Party itself is "rather exclusive" and "does not contain members who are involuntary members or who were brought into the organization by force or duress". They observed, however, that the membership of many aliens in Communist-affiliated organizations was involuntary, and would come within the escape provision if extended to past members of such proscribed organizations. 97 Cong. Rec. 2369.

membership involuntary. There is a wide disparity between his case and the instances of the "Iron Curtain" emigres cited by members of the Senate Judiciary Committee. It follows that petitioner cannot qualify under the exception to Section 22 contemplated by Congress and incorporated in the *Galvan* opinion.

C. IT IS IMMATERIAL THAT PETITIONER MAY HAVE BEEN UNCONCERNED WITH OR UNAWARE OF THE COMMUNIST PARTY'S ULTIMATE POLITICAL OBJECTIVES WHEN HE JOINED IT

Petitioner now contends for the first time that in joining the Communist Party he was unaware that it operated "as a distinct and active political organization" and that he had no real knowledge of its "platform and purposes" (Pet. Br. 23). His position seems to be that while he joined the Party, aware that he was joining an organization known as the Communist Party (see *Galvan v. Press*, 347 U. S. at 528), "he gave no thought to the organization as a distinct political organization" (Pet. Br. 23) but was concerned only with its economic activities.

Even if petitioner's premise were well taken that amenability to deportation for Communist Party membership is conditioned on proof that the alien was fully cognizant that the Party was a political entity, as well as an organization with immediate economic objectives, the evidence in this case refutes his contention. The fact that petitioner was chosen by the Communist Party to run its bookstore shortly after joining, and his acquaintance with the Party classics (apparently relating back to the period of

his membership), support the inference that he was not totally oblivious of its political objectives. There is also his statement that he joined the Party to petition the political agencies of government to obtain unemployment relief, and his testimony that having (R. 31-32) "seen the Communists working, *since I knew of them*, they are aiming, more or less, with forever [sic] methods to set up an economic system to get the people out of a monopoly control on to their own economic feet." [Emphasis added.] These facts and the evidence summarized above (*supra*, pp. 5-7) compel the conclusion that petitioner was no "innocent dupe" (Cf. *Galvan v. Press*, *supra*, 347 U. S. at 526) who mistook the Communist Party for a social agency. By his own admission, he joined the Party to seek economic reforms for the unemployed through political action (*e. g.*, petitioning for and obtaining from (R. 31) "city, state and national government * * * unemployment laws and a certain budget").

His position here seems to be that, while he was aware of the immediate political and economic objectives of the Party in meeting the depression problems at hand, he was unaware of the more fundamental political objectives of the Party including advocacy of force and violence to obtain these goals. This also appears to have been his position in 1947 when, after admitting in a sworn statement that he joined the Party to seek governmental reforms, he explained (R. 31):

Even at the few communist meetings I attended, nothing was ever said about overthrowing anything. All they talked about was fight-

ing for the daily needs. That is why we never thought much of joining those parties in those days.

The same position was taken by Galvan who urged the Court (*Galvan v. Press, supra*, 347 U. S. at 525-526) "to construe the Act as providing for the deportation only of those aliens who joined the Communist Party fully-conscious of its advocacy of violence, and who, by so joining, thereby committed themselves to this violent purpose."¹⁰ However, the Court expressly rejected this contention (347 U. S. at 526):

But the Act itself appears to preclude an interpretation which would require proof that an alien had joined the Communist Party with full appreciation of its purposes and program. In the same section under which the petitioner's deportation is sought here as a former Communist Party member, there is another provision, subsection (2) (E), which requires the exclusion or deportation of aliens who are "members of or affiliated with" an organization required to register under the Internal Security Act of 1950, "unless such aliens establish that they did not know or have reason to believe at the time they became members of or affiliated with such an organization * * * that such

¹⁰ The petitioner in *Galvan v. Press, supra*, like Rowoldt, took the position that his interest in the Party was confined to one phase of its activities. Galvan stated in response to a question whether he had ever attended meetings of the Spanish Speaking Club, an alleged Communist Party unit, "The only meetings I attended were relating to the Fair Employment Practices Committee". 347 U. S. at 524. He argued here (347 U. S. at 528) "first, that he did not join the Party at all, and that if he did join, he was unaware of the Party's true purposes and program".

organization was a Communist organization." 64 Stat. 1007. In describing the purpose of this clause, Senator McCarran, the Act's sponsor, said: "Aliens who were innocent dupes when they joined a Communist-front organization, as distinguished from a Communist political organization [such as the Communist Party], would likewise not ipso facto be excluded or deported." 96 Cong. Rec. 14180. In view of this specific escape provision for members of other organizations, *it seems clear that Congress did not exempt "innocent" members of the Communist Party.* [Emphasis added.]

Even under the Alien Registration Act of 1940¹¹ it was not incumbent on the government to prove, in addition to membership in an organization advocating overthrow of the United States by force and violence, that the alien subscribed to the political objectives of the organization. *Harisiades v. Shaughnessy*, 342 U. S. 580.¹² Petitioner's assertion, therefore, that

¹¹ The Act of October 16, 1918 (40 Stat. 1012), as amended by the Act of June 5, 1920 (41 Stat. 1008), and the Act of June 28, 1940 (54 Stat. 670, 673, 8 U. S. C. (1946 ed.) 137, provided:

"Sec. 1. That any alien who, at any time, shall be or shall have been a member of any one of the following classes shall be excluded from admission into the United States.

* * * *

"(c) Aliens who believe in, advise, advocate, or teach, or who are members of or affiliated with any organization, association, society, or group, that believes in, advises, advocates, or teaches: (1) the overthrow by force or violence of the Government of the United States or of all forms of law, * * *."

¹² The secure legislative foundation for the Court's conclusion in *Harisiades* and *Galvan* is spelled out in the Government's briefs in those cases: *Harisiades*, Oct. Term 1951, pp. 29-47; *Galvan*, Oct. Term 1953, pp. 67-69, and Supplemental Memorandum, pp. 2-11.

(Pet. Br. 23), "in joining an organization whose one aim was, he thought, to fight for bread, [he] was not thereby committing himself to a political platform as commonly understood", would not, even if such conclusion were justified on the evidence, establish that he was not a "member" of the Communist Party within the meaning of Section 22.

D. PETITIONER'S MEMBERSHIP IN THE COMMUNIST PARTY WAS NOT ACCIDENTAL, ARTIFICIAL, OR IN NAME ONLY

Petitioner also urges that in its totality—considering the brief period of his membership, the relative unimportance of his activities in the Party (which he assumes without amplification), and the meritorious objectives he says he hoped to achieve—his membership must be considered as "nominal". He relies on the language from *Colyer v. Skeffington*, 265 Fed. 17, 72 (D. Mass.), quoted by this Court in *Galvan*, 347 U. S. at 527, 528, that "Congress could not have intended to authorize the wholesale deportation of aliens who, accidentally, artificially, or unconsciously in appearance only, are found to be members of or affiliated with an organization of whose platform and purposes they have no real knowledge". But the type of nominal membership there referred to is explained by the illustration in the *Colyer* opinion immediately preceding that quotation:

* * * *I do not think that Congress meant to authorize the expulsion of aliens who pass from one organization into another, supposing the change to be a mere change of name, and that by assenting to membership in the new organization they had not really changed their affiliations or political or economic activities. For*

illustration: When, at meetings of a local of the Socialist Party, notice was given that the local had been expelled or had seceded from the Socialist Party and would thereafter take the name "Communist", and that signatures for membership in the new organization were requisite, nothing more appearing, I could not hold that such new membership, thus created, brings the new members within the purview of the act of Congress. [Emphasis added.]

Petitioner was not that kind of nominal member, suddenly and automatically transferred, without his real knowledge or consent, from one organization to another. He voluntarily and consciously joined the Communist Party; as such (*supra*, pp. 5-7, 17-19, 27-28).

The statute makes no exception for the time of membership (although in the 1952 Act there is provision for suspension of deportation for those who have not been Party members for the past ten years and who meet other conditions).¹³ Nor is exception made for the length or prominence of membership, so long as the membership was voluntary and conscious. This represents a deliberate Congressional judgment. As far back as the Alien Registration Act of 1940, the report on the bill declared (S. Rep. 1796; 76th Cong., 3rd Sess.):

Section 23 amends the act of October 16, 1918, which provides for the exclusion and deportation from the United States of aliens who are members of the anarchistic and similar

¹³Section 244 (a) and (c) of the Immigration and Nationality Act of 1952, 66 Stat. 215-216.

classes, so as * * * to also provide that any alien who has been a member of such classes at any time after his admission to the United States. (*for no matter how short a time or how far in the past so long as it was after the date of entry*), shall be deported. [Emphasis added.]

See also Conference Report, H. Rep. 2683, 76th Cong., 3rd Sess., p. 9. This Court so recognized in the *Coleman* and *Mascitti* cases, covered by the decision in *Harisiades v. Shaughnessy*, 342 U. S. 580, where, although the period of the membership was longer than petitioner's, it was in *Mascitti's* case older, and in *Mrs. Coleman's* less active. See the Government's brief in Nos. 43, 206, 264, O. T. 1951, pp. 9-10, 13-14. In particular, as the legislative history set forth in the Governments' *Harisiades* brief makes clear (No. 43, O. T. 1951, pp. 72-79), and as this Court recognized in its *Harisiades* opinion (342 U. S. at 595-596), Congress deliberately chose not to make deportation turn on length of membership because of exactly the situation presented by this case, where the termination of membership came, not because of any change of heart at the time, but because of the fear of deportation proceedings (*supra*, pp. 6-7).

As we have already pointed out, the only test of deportability under the statute is whether the alien joined the Party with knowledge that he was joining that specific organization and "of his own free will" (*Galvan v. Press, supra*, 347 U. S. at 528). Petitioner meets that test. He joined the Party knowing that it was such; he was an adult at the time; he was not compelled to join by duress, economic or political.

What he did was not done under misapprehension or accidentally, but because he believed the Party served a purpose at the time. Though his period of membership may have been relatively brief, it was not inactive or passive. The sum of it is that, as in Galvan's case, "the record does not show a relationship to the Party so nominal as not to make him a 'member' within the terms of the Act" (347 U. S. at 529).

E. NO VALID REASON WARRANTS REOPENING THE ADMINISTRATIVE PROCEEDINGS FOR RECONSIDERATION BY THE IMMIGRATION AND NATURALIZATION SERVICE

Petitioner argues that, at the least, the case should be remanded for further administrative action since, on his interpretation, the Immigration and Naturalization Service failed to apply the correct legal standard of membership. But in the terms of the 1951 amendment and this Court's decision in *Galvan*, as developed above, there are no facts on which a valid claim of unknowing or nominal membership could be predicated. There is no dispute as to the basic fact that petitioner did join the Communist Party knowing it to be such, attended meetings, ran its bookstore, and resigned only because of the fear of deportation proceedings. On these facts, as we have shown, he was clearly a "member."

Petitioner made no claim that his admitted membership in the Party had been only "nominal" either at the time of his deportation hearing (R. 16-20) or on the administrative appeal (R. 9-15), but based his defense to the deportation charges solely on the

ground that Section 22 was unconstitutional and that there were procedural irregularities in the hearing.¹⁴ It cannot be assumed therefore that the immigration authorities applied an erroneous definition of membership in petitioner's case, or would have failed to consider his claim to "nominal" membership had it been fairly presented.

Petitioner relies on *Garcia v. Landon*, 348 U. S. 866, where after this Court had granted a writ of certiorari (347 U. S. 1011) the Immigration and Naturalization Service moved before the Board of Immigration Appeals to withdraw the outstanding warrant of deportation and reopen the proceedings to permit Garcia to present evidence as to whether his membership in the Communist Party was voluntary, and to apply for discretionary relief under the 1952 Act. In Garcia's case, however, there were facts which raised an issue as to whether his membership was voluntary under the caveat in *Galvan*. Garcia had only three years schooling in Mexico and had such a limited knowledge of the English language that his hearing had to be conducted through an interpreter. R. 21, 36, No. 118, Oct. Term 1954. He contended that during a period of unemployment, and having a large family then consisting of a wife and six or seven small children to support, he turned to the Workers Alliance (which held meetings in the same hall as the Communist Party) to get food and shoes for his family. Garcia asserted that he made no application

¹⁴ This was also his position in the petition for a writ of habeas corpus (R. 1-3).

for Communist Party membership, paid no dues, held no office or official position in the Party, and (if he was a member) dropped out voluntarily when the employment situation improved (*Ibid.*, pp. 41-42). It was also uncertain on that record whether he distinguished between the Communist Party and the Workers Alliance. There was thus a possibility that Garcia could show that his connection with the Party was not a knowing one. No equivalent facts are presented here, and the record is clear.

While this Court's decision in *Galvan* had not been handed down at the time of petitioner's deportation hearing, that ruling did not read new meaning into the term "member" in Section 22 of the Internal Security Act, but merely confirmed that the term was intended to import the same meaning as before the 1950 Act, and as further defined in the 1951 clarifying legislation (347 U. S. at 527-528). On the basis of this understanding, the Court found no need to vacate the administrative findings as to *Galvan* since there was no ambiguity in the controlling findings or error of law appearing on the face of the record.

In the instant case, there is even less reason to reopen the administrative record on the assumption that the Service misconstrued the law it was administering. By the time of this petitioner's deportation hearing, the misunderstanding as to the proper meaning of the term "member" had been dispelled by the passage of the 1951 clarifying legislation, and the promulgation of a new regulation of the Immigration and Naturalization Service redefining or, more

properly, clarifying the term for administrative purposes.¹⁵ Moreover, the issue here does not depend upon the resolution of conflicting facts, but on whether petitioner was, by his own admissions, a "member," as that term is used in the statute. This question is essentially one of law, and no purpose would be served by remand of the cause to the administrative agency.

II

THERE IS NO REASON TO RECONSIDER THE CONSTITUTIONAL HOLDING OF *Galvan v. Press*

A. In his petition for a writ of certiorari, petitioner stated as his second question presented (Pet. 2) "whether, notwithstanding *Galvan*, the statute providing for deportation of aliens for past membership in the Communist Party is unconstitutional on its face or as applied to the facts in this case." Without elaborating on that point in argument he asked the Court to overrule its *Galvan* decision, and, alternatively, to consider (Pet. 10) "whether the statute sustained in *Galvan* can reach so far as to be constitutionally applied on the facts in this case." In his brief on the merits, however, petitioner does not pursue

¹⁵ This regulation provided (8 C. F. R. [1951 Supp.] 174.1 (i), 16 F. R. 2907 (April 4, 1951)) :

"The terms 'members of' and 'affiliated with' where used in the act of October 16, 1918, as amended, shall include only membership or affiliation which is or was voluntary, and shall not include membership or affiliation which is or was solely (1) when under sixteen years of age, (2) by operation of law, or (3) for purposes of obtaining employment, food rations, or other essentials of living, and where necessary for such purposes."

the argument that this case raises additional constitutional problems not present in *Galvan* but seeks solely to reargue constitutional issues which were before the Court not only in *Galvan*, but also in *Harisiades v. Shaughnessy*, 342 U. S. 580.

It is the government's position that the issues now argued by petitioner have been firmly settled. During the past five years they have twice been fully presented to the Court, in detail, and have twice been decided in comprehensive opinions. Petitioner brings forward no argument which has not been made heretofore. No changed conditions are, or can be, alleged; nor is the Court being asked to review decisions rendered in a period or milieu said to be outmoded, or based on constitutional principles which are no longer accepted or have been limited since the challenged decisions were rendered. Since *Galvan*, the Court has twice recognized its constitutional principles as settled. *Jay v. Boyd*, 351 U. S. 345, 348 (recognizing the power in Congress under Section 22 to deport an alien who was a voluntary member of the Communist Party during the period 1935-1940); *Marcello v. Bonds*, 349 U. S. 302, 314 (rejecting the contention that deportation for crimes committed prior to passage of Section 241 (a) (11) of the Immigration and Nationality Act of 1952 is violative of the *ex post facto* clause). See also *MacKay v. Boyd*, 218 F. 2d 666 (C. A. 9), certiorari denied, 350 U. S. 840.

In these circumstances, we submit that there is no occasion for a third reconsideration by the Court of the governing constitutional ruling and no need to

reargue the issues which are extensively discussed in the Government's briefs in *Harisiades* (Nos. 43, 206, 264, Oct. Term, 1951) and *Galvan*, No. 407, Oct. Term, 1953.

B. While we shall not here reargue the constitutionality of Section 22 or the validity of this Court's reasoning sustaining that position, it is appropriate to point out a fundamental error in petitioner's argument on this point. The Government's brief in *Galvan* (No. 407, Oct. Term 1953, pp. 40-54) reviewed at some length the nineteen-year history of exhaustive congressional inquiry which resulted in the legislative determination that past membership in the Communist Party was a reasonable basis for the deportation of aliens—the policy underlying the enactment of Section 22 of the Internal Security Act of 1950 and the comparable provisions of the 1952 Act. The Court, after adverting to this “extensive investigation” and the legislative findings incorporated in Section 2 (1) of the Internal Security Act that the “Communist movement * * * is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship”, concluded that it could not judicially determine (347 U. S. at 529) “that this classification by Congress is so baseless as to be violative of due process and therefore beyond the power of Congress.” Petitioner, however, conceives the *Galvan* holding to mean that (Pet. Br. 25) “Congress may expel aliens for causes which have no ra-

tional relationship to their desirability as residents, and which may be wholly arbitrary, whimsical, or worse."

It is not necessary here to consider hypothetical situations in which this legislative power might be exercised on the basis of bare pretense or caprice or out of concern for wholly non-existent dangers either to national sovereignty or to international relations. The legislative policy toward alien membership in the Communist Party incorporated in Section 22 of the 1950 Act was developed and continued upon the basis of several studies by congressional committees, which concluded that the Communist movement in this country is heavily laden with aliens, and that Soviet control of the American Communist Party has been largely through alien Communists (*Harisiades v. Shaughnessy*, *supra*, 342 U. S. at 590). Congress also had evidence that, unless its deportation legislation reached past members of the Communist Party, aliens would, as in the past, drop their membership—as did petitioner—or be expelled from the party only to avoid deportation and not as a genuine renunciation of methods of force and violence. See the Government brief in *Harisiades*, Nos. 43, 206, 264, Oct. Term, 1951, pp. 72–95. In enacting Section 22, Congress was not setting up a standard of personal guilt but was classifying aliens whom it deemed undesirable residents of the country, and it could conclude, on the basis of its studies and inquiries, that past members of the Communist Party comprised a class sufficiently inimical to present and future national security to warrant expulsion. *Harisiades v. Shaughnessy*, *supra*,

342 U. S. at 595-596. As the Court held in *Galvan*, this classification by Congress is not (347 U. S. at 529) "so baseless as to be violative of due process and therefore beyond the power of Congress."

But the Court did not hold that all immigration legislation, however fantastic or arbitrary, is wholly freed from the constitutional limitation of substantive due process, and from all judicial review under that standard. It held that the formulation of immigration *policies* which "are peculiarly concerned with the political conduct of government" is "entrusted exclusively to Congress." 347 U. S. at 531.¹⁶ This position is not an abrogation of the judicial function (see Pet. Br. 25), but judicial deference to a legislative determination of policy in respect to the exercise of a power given Congress by the Constitution, and delegated by it to the executive arm of the government for administration. It is also a recognition of the basic principle that each of the three coordinate branches of government is equal in respect to the others, though supreme in its particular area of competence. And as this Court observed in *Harisiades* (342 U. S. at 588-589), "any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government"; and such matters are "so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference."

¹⁶ See also *Shaughnessy v. Mezei*, 345 U. S. 206, 210; *Harisiades v. Shaughnessy*, 342 U. S. at 589.

Petitioner's arguments seeking to impeach the factual premises of this legislative policy (Pet. Br. 42-48; Appendix to Pet. Br.) do not justify judicial reevaluation of these reiterated congressional conclusions. And though there well may be hardship to himself and to the other aliens in the cases which he cites (Pet. Br. App.), it is not the function of the courts to overturn a legislative determination in this field because it is severe or entails individual suffering or may well be a "legislative mistake". *Harisiades*, 342 U. S. at 590; *Galvan*, 347 U. S. at 530-1; *Shaughnessy v. Mezei*, 345 U. S. 206, 216; *Fong Yue Ting v. United States*, 149 U. S. 698, 731; *Li Sing v. United States*, 180 U. S. 486, 495; *United States ex rel Klonis v. Davis*, 13 F. 2d 630, 630-1 (C. A. 2) (L. Hand, J.).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

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In the Supreme Court of the United States

OCTOBER TERM, 1957

CHARLES ROWOLDT, PETITIONER

v.

J. D. PERFETTO, Acting Officer in Charge, Immigration and Naturalization Service, Department of Justice, St. Paul, Minnesota

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

SUPPLEMENTAL MEMORANDUM FOR THE RESPONDENT AFTER REARGUMENT

**J. LEE RANKIN,
Solicitor General,
Department of Justice,
Washington 25, D. C.**

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 5

CHARLES ROWOLDT, PETITIONER

v.

J. D. PERFETTO, Acting Officer in Charge, Immigration and Naturalization Service, Department of Justice, St. Paul, Minnesota

*On Writ of Certiorari to the United States Court
of Appeals for the Eighth Circuit*

**SUPPLEMENTAL MEMORANDUM FOR THE
RESPONDENT AFTER REARGUMENT**

This memorandum is submitted in response to certain questions asked from the bench during the reargument on October 14, 1957. We submit the factual information requested, without comment or argument.

I.

Mr. Chief Justice Warren requested information as to the subsequent proceedings in the *Garcia* case referred to in the Government's original brief in this case at pp. 36-37. That information is as follows:—

Certiorari was granted in *Garcia v. Landon* on June 7, 1954 (347 U.S. 1011). On August 11, 1954, the Immigration and Naturalization Service made a motion before the Board of Immigration Appeals to withdraw the outstanding order of deportation against Garcia and, in the light of this Court's opinion in *Galvan v. Press*, 347 U.S. 522, to have the proceedings reopened to afford Garcia an opportunity to present such further evidence as he wished on the question of whether his membership in the Communist Party was voluntary, as well as to file an application for discretionary relief under the Immigration and Nationality Act of 1952.¹ Garcia did not oppose the motion, and on September 21, 1954, the Board of Immigration Appeals granted the motion and ordered that the warrant of deportation be withdrawn. This action was brought to the attention of the Court by the Solicitor General, in October 1954, in a Memorandum Suggesting That The Cause is Moot. On November 8, 1954, the Court vacated the judgment of the Court of Appeals and remanded the case to the District Court with directions to dismiss the petition for writ of habeas corpus upon the ground that the cause was moot. *Garcia v. Landon*, 348 U.S. 866.

Thereafter, on January 31, 1955, Garcia's deportation hearing was reopened before a Special Inquiry Officer at Los Angeles; the hearing was completed on August 23, 1955. Garcia testified at this reopened hearing. On September 22, 1955, the Special Inquiry

¹ Such discretionary relief was not available under the Internal Security Act of 1950 to aliens found to have been members of the Communist Party.

Officer, upon the basis of all the evidence (including that taken at the original hearings and that taken at the reopened hearing), found that Garcia had been "a voluntary member of the Communist Party of the United States at Los Angeles, California in 1939 and 1940", and was deportable on that ground. The Special Inquiry Officer denied discretionary relief on the ground that Garcia was statutorily ineligible for suspension of deportation under Section 244(a) (5) of the 1952 Act because he had been absent from the United States for less than one day on May 15, 1949, and therefore could not establish that he had been physically present in the United States for a period of ten years preceding his application for suspension of deportation as required by Section 244 (a) (5).

On January 25, 1956, the Board of Immigration Appeals, on Garcia's appeal, affirmed as to both issues, i.e., deportability and ineligibility for discretionary relief.

On January 31, 1956, Garcia filed an action for judicial review of, and injunctive relief against, the new order of deportation. *Carlos Alvarez Garcia v. Barber, et al.*, U.S. Dist. Ct. for the Southern District of California, Civil Action No. 19428-WB.

On September 21, 1956, while the District Court action was still pending, the Commissioner of Immigration and Naturalization, upon a review of Garcia's case, determined that "certain compassionate features" had been disclosed which warranted further investigation. On October 15, 1956, the Commissioner filed a new motion with the Board of Immi-

gration Appeals asking for the withdrawal of the outstanding order of deportation and that the hearing be reopened and remanded to the Special Inquiry Officer for further consideration of eligibility for discretionary relief. The motion stated that because of the "appealing factors" in Garcia's case, "and in the absence of any further derogatory information, careful consideration must be given to the availability of any means whereby the immigration status of the respondent may be adjusted"; the Service proposed, the motion also stated, to conduct an investigation into Garcia's activities and "if the report is favorable to the respondent [Garcia], consideration should then be given by the special inquiry officer as to whether the respondent can qualify under the law for the privilege of voluntary departure" (which would make him eligible for consideration for the issuance of an immigrant visa under Section 212(a)(28)(I)(ii) of the 1952 Act).

On November 9, 1956, the Board of Immigration Appeals ordered, in response to this motion, that the outstanding order and warrant of deportation be withdrawn, and the proceedings reopened. The Board stated: "The Service is motivated by a desire to help the alien adjust his status to that of a lawfully permanent resident alien, if it is at all possible and if the results of a current character investigation reveal that discretionary relief is appropriate. * * *

It is apparent that the Service believes it will have more freedom in assisting this alien to adjust his status if the outstanding order and warrant of deportation are withdrawn. We have the utmost con-

fidence that the Service will take no action which would endanger the health of the respondent and it may well be that the Service can find means of assisting the respondent without requiring him to either appear at formal hearings or requiring him to be absent from his family for any extended period.”²

Thereafter, on November 13, 1956, the Commissioner of Immigration and Naturalization, on the basis of the various factors in Garcia's case, directed that his case be placed in the non-priority inactive category with no further administrative proceedings to be taken. If at the end of a year the Regional Commissioner at San Pedro, California, was of the view that circumstances had changed sufficiently to warrant a change in the non-priority designation, the case could be again submitted to the Commissioner in Washington.

On November 21, 1956, by stipulation of counsel, and an order of the District Court, Garcia's action in the Southern District of California (Civil Action No. 19428-WB) was discontinued and dismissed without prejudice and without costs. The order of dismissal was entered on November 26, 1956.

² The Board had already noted, in its opinion on the new motion to reopen, that Garcia's counsel had stated, with respect to that motion, that he would welcome a reopening were it not for the fact that Garcia was in ill health and could not stand the strain of additional hearings or the separation from his family while awaiting an immigrant visa outside the country; counsel also questioned whether Garcia had sufficient funds for this purpose.

II.

Mr. Justice Frankfurter inquired whether any instructions or regulations were issued by the Department of Justice or the Immigration and Naturalization Service, after the decision in *Galvan v. Press*, 347 U.S. 522, with respect to the meaning or content of "membership". No such instructions or regulations were issued.

III.

Mr. Chief Justice Warren inquired whether the Communist Party was on the ballot in Minnesota in 1935. According to the Statistical Abstract of the United States (1937), p. 159, the 1936 presidential nominee of the Communist Party was on the ballot in Minnesota.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

OCTOBER 17, 1957

MOTION FILED AUG 23 1956

In the Supreme Court

OF THE
United States

OCTOBER TERM 1956

No. ~~34~~ 5

CHARLES ROWOLDT,

Petitioner,

vs.

J. D. PERFETTO, Acting Officer in
Charge, Immigration and Naturali-
zation Service, Department of Jus-
tice, St. Paul, Minnesota.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

and

**BRIEF AMICUS CURIAE ON BEHALF OF
INTERNATIONAL LONGSHOREMEN'S AND
WAREHOUSEMEN'S UNION.**

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In the Supreme Court

OF THE
United States

OCTOBER TERM 1956

No. 34

CHARLES ROWOLDT,

Petitioner,

vs.

J. D. PERFETTO, Acting Officer in
Charge, Immigration and Naturali-
zation Service, Department of Jus-
tice, St. Paul, Minnesota.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE.

International Longshoremen's and Warehousemen's Union hereby respectfully moves for leave to file a brief amicus curiae in this case. The consent of the attorney for the petitioner has been obtained; the consent of the attorney for the respondent was requested but refused.

The interest of International Longshoremen's and Warehousemen's Union in this case arises from the fact that approximately 20 per cent of its members are foreign born and that some of them may be sub-

ject to deportation, as is the petitioner herein, if the judgment below is not reversed.

In the instant case in the Court of Appeals, and in its petition for certiorari here, petitioner argued primarily as to the applicability, to the facts of this case, of this Court's decision in *Galvan v. Press*, 347 U.S. 522, and barely mentioned the constitutional issues posed by a statute permitting deportation for long past and presumably innocent membership in the Communist Party. For understandable reasons, petitioner also barely argued that *Galvan v. Press* was erroneously decided and should be reversed. Since it is likely that petitioner may pursue the same course in its briefs on the merits, it is believed that the brief which amicus curiae is requesting permission to file contains a more complete argument upon the constitutional issues and upon the proposition that *Galvan v. Press* should be overruled. If this argument is accepted, it would be dispositive of the case.

Dated, San Francisco, California,

August 22, 1956.

Respectfully submitted,

NORMAN LEONARD,

*Attorney for International Longshoremen's
and Warehousemen's Union, Amicus
Curiae.*

GLADSTEIN, ANDERSEN, LEONARD

& SIBBETT,

Of Counsel.

In the Supreme Court

OF THE
United States

OCTOBER TERM 1956

No. 34

CHARLES ROWOLDT,

Petitioner,

VS.

J. D. PERFETTO, Acting Officer in
Charge, Immigration and Naturali-
zation Service, Department of Jus-
tice, St. Paul, Minnesota.

**BRIEF OF INTERNATIONAL LONGSHOREMEN'S
AND WAREHOUSEMEN'S UNION
AS AMICUS CURIAE.**

This Court in *Galvan v. Press*, 347 U.S. 522, held valid the provisions of the Internal Security Act of 1950, 64 Stat. 987, 1006, 1008, pursuant to which a lawfully resident alien was ordered deported solely for long past membership in the Communist Party.

It is the submission of amicus curiae that the statute is unconstitutional, that the *Galvan* decision

was erroneous, and that the grant of certiorari in this case provides an opportunity for the Court to correct its error and to strike down a patently unconstitutional statute. This Court hardly need be reminded that it has in the past overruled prior decisions when it has become convinced that they were erroneous. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379; *West Virginia v. Barnette*, 319 U.S. 624.

The statute involved, permitting as it does deportation¹ for long since past and (then) innocent conduct, without regard to evil intent or scienter on the part of the alien, fails to meet the constitutional tests on a number of grounds, any one of which requires a declaration of its invalidity.

1. Under prior decisions of this Court, a legislative act which penalizes political activities, legal when engaged in, is a bill of attainder and cannot withstand constitutional condemnation. If this is true of a bill denying compensation for services rendered (*United States v. Lovett*, 328 U.S. 303) or depriving one of the right to practice a profession (*Ex parte Garland*, 4 Wall. 333; *Cummings v. Missouri*, 4 Wall. 356), how much more so does it apply to a deportation statute?

2. It has also been held that the due process clause does not permit a statute to operate retrospectively without fair notice to those affected thereby. This principle is undoubtedly applicable to deportation

¹The awesome consequences of deportation have been noted by this Court so often as to make any extended citation of authority a work of supererogation. See, by way of example, *Ng Fung Ho v. White*, 259 U.S. 276; *Fong How Tan v. Phelan*, 333 U.S. 6, 10.

statutes. *Bugajewitz v. Adams*, 228 U.S. 585; *Jordan v. George*, 341 U.S. 223.

3. The statute's direct restraint upon the First Amendment rights of speech and assembly, is still another reason why it cannot stand, for that Amendment's guarantees apply to aliens as well as to citizens. *Bridges v. Wixon*, 326 U.S. 135. The clear and present danger test, even as enunciated in *Dennis v. United States*, 341 U.S. 494, is not met by a statute which penalizes ancient, remote and innocent past political activities. The failure of the statute to require proof of some probability of the occurrence of a substantive evil, from the continued presence of the alien, is fatal to its constitutionality.

4. To deport all persons who were at some time in the remote past, and for however short a period or however innocently, members of the Communist Party, is to establish an arbitrary and unreasonable classification which bears no relationship to any substantive evil against which Congress may legitimately legislate. The statute therefore offends not only the due process clause, but the equal protection clause, because of the lack of rationality in the classification which it sets up. It is thus outside the constitutional power of Congress. See *Hirabayashi v. United States*, 320 U.S. 81; *Korematsu v. United States*, 323 U.S. 214. Even in the field of deportation, no one would suggest that Congress could direct the deportation of all Jewish aliens or of all red-headed ones.

5. The failure to distinguish between innocent and knowing membership is arbitrary and unreasonable

and for this reason, too, the statute must be stricken down. *Wieman v. Updegraff*, 344 U.S. 183 and *Slochower v. Board of Education*, 350 U.S. 551.

There may yet be other constitutional vices in the statute under consideration, but certainly the foregoing are sufficient to require that it be stricken down.

In *Galvan*, however, this Court refused to do this, asserting that despite the force of the constitutional argument, the "slate is not clean". The Court suggested that because its earlier decisions had said that policies relating to aliens were "peculiarly" the concern of other branches of government, the judiciary must stay its hand. It is respectfully submitted that in this the Court fell into error.

Certainly the formulation of such policies is the concern of Congress. So is the formulation of policy in every other field of Federal legislative power. But it is nowhere written, either in the Constitution or out of it, that such or any policies may be formulated and enforced without regard to the constitutional limitations upon Congress. Certainly no power is more "political" or "sovereign" in this sense than the war power, and yet this Court in *Galvan*, citing *Hamilton v. Kentucky Distillers and Warehouse Co.*, 251 U.S. 146, recognized that it had long since imposed "substantive due process" limitations upon even that power. And a Court of Appeals has recently held, without further challenge from the government, that

“procedural due process” is a limitation upon the enforcement of policies relating to the “security” of the American merchant marine. *Parker v. Lester*, 227 Fed.2d 708 (9 Cir.). Other examples may be multiplied, but the significance to the present argument is not the number of cases which may be cited, but the recognition of the fundamental principle that Congress, like every other branch of government, not only has merely limited, delegated powers, but that such powers as it does have are themselves circumscribed by the terms of the Constitution. That is to say, Congress’ powers in any field are subordinate to, and not superior to, the provisions of the Constitution, including the prohibitions of the Bill of Rights and the Fourteenth Amendment. Those prohibitions as we have seen, are indubitably breached by the statute under consideration.

Nor is there anything in the “slate” referred to in *Galvan* which precludes this Court from carrying out its constitutional duty to declare this legislation invalid. The mere fact that a statute deals with aliens has never prevented this Court from exercising the constitutional duty enunciated as long ago as *Marbury v. Madison*, 1 Cranch 137, of keeping other branches of government within the bounds of the Constitution. Cf. *Bridges v. Wixon*, 326 U.S. 135; *Kessler v. Strecker*, 307 U.S. 22; *U. S. ex rel. Tisi v. Tod*, 264 U.S. 131.

CONCLUSION.

What this case presents, therefore, is the simple question of whether, merely because it is aliens who are the subject matter of legislation, Congress' power is untrammelled by the Constitution. We submit that our theory of the Constitution does not permit such a result, and that this Court erred in so holding in *Galvan v. Press*. We urge that the legislation in question be reviewed in the light of the constitutional standards otherwise applicable, and that thereupon it be stricken down, and that the judgment below be reversed.

Dated, San Francisco, California,

August 22, 1956.

Respectfully submitted,

NORMAN LEONARD,

*Attorney for International Longshoremen's
and Warehousemen's Union, Amicus
Curiae.*

GLADSTEIN, ANDERSEN, LEONARD

& SIBBETT,

Of Counsel.

SUPREME COURT, U.S.

MOTION FILED SEP 7 1956

IN THE
Supreme Court of the United States

October Term, 1956⁷

No. ~~24~~ 5

CHARLES ROWOLDT,

Appellant,

vs.

J. D. PERFETTO, Acting Officer in Charge of Immigration
and Naturalization Service,

Respondent.

**MOTION FOR LEAVE TO FILE BRIEF OF AMICI
CURIAE AND BRIEF AMICUS CURIAE IN
SUPPORT OF APPELLANT**

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OSMOND K. FRAENKEL,

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IN THE
Supreme Court of the United States

October Term, 1956

No. 34

CHARLES ROWOLDT,

Appellant,

VS.

**J. D. PERFETTO, Acting Officer in Charge of Immigration
and Naturalization Service,**

Respondent.

**MOTION FOR LEAVE TO FILE BRIEF OF
AMICI CURIAE**

The undersigned organization, by and through its counsel, respectfully ask leave to file the within Brief *Amicus Curiae* on behalf of appellant in the above entitled action.

Counsel for said applicant are familiar with the question involved in the case, and the scope of their presentation, and believe there is a necessity for additional argument on the points specified hereinafter and in its brief.

Applicant is a national association of attorneys devoted to the cause of civil liberties and civil rights for *all* persons. Its interest in this litigation arises from its belief that Section 241(a)(6)(C)(i) of the Walter-McCarran Act is an unconstitutional legislative attempt to substitute a law for a trial.

Counsel for applicant are aware of this Court's ruling in *Galvan v. Press*, 347 U. S. 522, upon the constitutionality

of a law similar to the one now before it. However, counsel are informed and believe that the arguments therein advanced did not embrace the points raised in applicant's brief, nor do they seem to be discussed in the opinion itself.

Because it is important to the protection of the civil liberties of all persons, irrespective of citizenship, that laws hear before they condemn, and because applicant is convinced that the instant legislation is such a law, applicant respectfully requests permission to file the within Brief. *Amicus Curiae.*

Respectfully submitted,

ROYAL W. FRANCE,
Counsel for Applicant.

IN THE
Supreme Court of the United States

October Term, 1956

No. 34

CHARLES ROWOLDT,

Appellant,

vs.

J. D. PERFETTO, Acting Officer in Charge of Immigration
and Naturalization Service,

Respondent.

**BRIEF AMICUS CURIAE IN SUPPORT
OF APPELLANT**

In the case at bar, appellant has been ordered deported not because he has committed a crime, treason or espionage, or because he advocates—or ever advocated—the forceful overthrow of government, but solely because he was alleged to have been, twenty-one years ago, a member of the Communist Party of the United States.¹ The Board of Immigration Appeals, after sustaining a finding that the appellant was a member of that organization in 1935, declared:

“His deportation from the United States is mandatory.”²

If this is so, it is due to Section 241(a)(6)(C)(i) of the Immigration and Nationality Act,³ which provides, in per-

¹ See same case below: 228 F. (2d) 109.

² Ibid., p. 110.

³ 8 U. S. C. A. Sec. 1251 (a) (6) (C) (i), enacted June 27, 1952. Originally enacted in substantially the same language in the Internal Security Act of 1950, 8 U. S. C. A. Sec. 137 (2) (C).

4

inent part, that *any* alien shall be deported who—

“(6) is or *at any time* has been, after entry, a member of any of the following classes of aliens:

(c) Aliens who are members of or affiliated with

(i) the Communist Party of the United States

* * *

Amicus contends that the statute at bar is a bill of attainder and an unconstitutional usurpation of the judicial function by virtue of which certain named or easily identified aliens are denied procedural due process of law.

ARGUMENT

I. The statute at bar is, on its face, a bill of attainder.

Article I, Section 9 of the United States Constitution provides that:

“No bill of attainder * * * law shall be passed.”

“A bill of attainder is a legislative act which inflicts punishment without a judicial trial * * * These bills are generally directed against individuals by name; but they may be directed against a whole class * * *.” *Cummings v. State of Missouri*, 4 Wall. 277, at 323.

“It is very true that bills of attainder have been passed against persons by some description, when their names were unknown. But in such cases the law leaves nothing to be done to render its operation effectual, but to identify those persons. Their guilt, its nature, and its punishment are fixed by the statute, and only their personal identity remains to be made out.” *Ex parte Garland*, 4 Wall. 333, Miller, J., (dissenting, on other grounds) at 389.

A. *The statute under consideration here falls clearly within the definition of a bill of attainder. It is similar to other statutes which have, in the past, been declared void as bills of attainder because they described an attainted group:*

U. S. v. Lovett, 328 U. S. 303 (1946);
Davis v. Berry, 216 F. 413 (1914);
Opinion to Rhode Island House of Representatives,
 96 A. 2d 623 (1953).

Bills of attainder have been directed against:

a. Tories in the American Revolutionary War:

Cooper v. Telfair, 4 Dal. 14 (1800);
Sewall v. Lee, 9 Mass. 363 (1812).

b. Persons participating in duelling:

Matter of Dorsey, 7 Porter (Ala.) 294 (1830).

c. Secessionists and persons who avoided serving in Union forces in the Civil War:

Cummings v. Missouri, *supra*;
Ex parte Garland, *supra*;
Pierce v. Carskadon, 83 U. S. 234 (1872);
Green v. Shumway, 36 N. Y. Prac. 5 (1868).

d. Criminals twice convicted of a felony:

Davis v. Berry, 216 F. 413 (1914).

e. "Subversives" employed by the United States government in certain posts:

U. S. v. Lovett, *supra*.

f. Relatives and spouses of elective officials and heads of City departments:

Opinion to Rhode Island House of Representatives,
supra.

The group attainted by the Walter-McCarran Act can be identified as easily as several of these groups could be, and more easily than some of them.

B. The statute inflicts punishment without a judicial trial.

1. The *purpose* of many of the deportation arrests based on charges of political activity is punishment, not deportation.

Both the Attorney General of the United States and the Immigration and Naturalization Service have repeatedly stated that they could not effectuate deportation to "Iron Curtain" countries because of their policy of refusing to admit American political deportees for permanent residence. (See, *e. g.*, 1955 Annual Report of the Attorney General, p. 408.) In the face of this fact, the Attorney General has ordered the arrest of large numbers of persons whom he knew in advance he could not deport.

In 1954, the Committee on Immigration and Naturalization of the National Lawyers Guild prepared a statistical study based on 219 typical political deportation cases which arose between 1944 and 1952. ("Political Deportations in the United States: A Study in the Enforcement Procedures: 1919-1952", XIV Lawyers Guild Review 93-128, Fall, 1954, attached hereto and made a part hereof.) This study showed that, out of 204 cases in which the country of origin of the deportee was known, 47% were born in countries to which they could not be deported because the countries would not accept them for permanent residence.

2. The deportation *procedure* involves punishment and the threat of punishment.

The distinction between the procedures in deportation cases and criminal cases has been exaggerated in the past, but some courts have recently followed the facts and not the formula. The "principle inherent in [the eighth] Amendment"—forbidding excessive bail—has been held

applicable to deportation proceedings, "whether or not such proceedings technically fall within its scope." (*U. S. ex rel. Klig v. Shaughnessy*, 94 F. Supp. 157, 160 (S. D. N. Y. 1950), cited with approval by this Court in *Carlson v. Landon*, 342 U. S. 524, n. 41.) So, too, the Federal Rules of Criminal Procedure as to the manner of executing a warrant and making return thereon have been applied to deportation warrants. (*Ex parte Sentner*, 94 F. Supp. 77, 79 (E. D. Mo., E. D. 1950).)

In terms of denial of bail to deportees arrested on political charges and the setting of excessive bail, the distinction between these cases and criminal cases is negligible. (See, e.g., comments by Chief Judge Clark of the Second Circuit in *U. S. ex rel. Potash v. Dist. Dir.*, 169 F. 2d 747, 753 (1948), on the setting of higher bail for a deportee than had been set against the same person in a case on criminal charges.) In its study, the Guild's Committee found that, at the time of arrest, bail had been refused in 7% of the cases studied, and in 20% of the cases, bail of \$4,000 to \$5,000 had been set. ("Political Deportations", *op. cit.*, Table 14, p. 118.) In 71 cases, the deportees had been re-arrested once following their original release on bail. 15 deportees had been re-arrested twice, and 4 had been re-arrested 3 times. The average length of detention was 55 days, and 14 had been held for over 2 months. (Table 15, p. 121.)

Under the statute, a non-citizen can be detained for six months following a final order of deportation, pending efforts to effectuate his deportation. (Sec. 242(c).) And, after the six months have elapsed, the deportee is subject to stringent supervisory parole conditions as long as he continues to live in this country. (Sec. 242(d).)

This control over the freedom of movement of a deportee bears little resemblance to the treatment of a defendant in a civil action.

3. *Deportation* is punishment.

In the typical bill of attainder, the "punishment" is "fixed by statute". (*Ex parte Garland*, quoted *supra*.) "Deportation is not punishment", as the maxim would have it, but, ironically, the humane considerations that can be decisive in the sentencing of a defendant in a criminal case are, of necessity, inapplicable. An alien is deported or he is not; his sentence cannot be judicially suspended because of his good character, the fact that he has no previous criminal record, or that he has a dependent wife and children.

When the maxim was first written, there was some truth in it. In the 1892 Act, for instance, it was apparent that Congress was attempting to do no more than to expel those whom it had forbidden to enter, by requiring all resident Chinese laborers to secure certificates of residence showing them to be legally in the country by virtue of entrance before the first exclusion act.* (See, *e.g.*, *U. S. v. Jim*, 47 Fed. 433 (1891), in which a Chinese national, slated for expulsion, was able to prove to the Court that he had been in the United States over 10 years, and was therefore released, along with nine others similarly situated.) And in the earlier Act of 1888, Congress had provided an exception to allow re-entry of Chinese laborers otherwise excludable who could show, before leaving the United States, that they had a wife, child or parents in this country, or property valued at \$1,000.**

Compare these provisions with those in the 1952 Act, which require deportation regardless of the length of residence in the United States or the close relatives who would be left behind at the time of deportation. In its study, the Guild's Committee found that 63% of the deportees had resided in this country for more than 31 years. 96% had

* 27 Stat. 25.

** 25 Stat. 504 (Oct. 1, 1888) and 25 Stat. 476-7 Sept. 13, 1888).

resided here more than 21 years, and 98% more than 10 years. (See Table 2, p. 101.)

Half of the deportees studied were married, and 69 were married to United States citizens. 101 were parents of citizen-children and 24 had sons who fought in World War II or served in the American Armed Forces. At least 21 of the group were grandparents and two or more were great-grandparents of American citizens.

To deny that the "banishment" of such persons constitutes punishment is to become so involved in semantics as to completely lose sight of human realities.

C. The statute provides for penalty within the meaning of the Constitutional prohibition against bills of attainder.

Whether or not deportation is punishment within the definition applicable to criminal law, it is similar to penalties inflicted by statutes held void as bills of attainder:

Bills of attainder have:

a. Prohibited individuals from voting, holding public office or private position of trust and profit, or practicing law or other professions:

Matter of Dorsey, supra;

Cummings v. Missouri, supra;

Ex parte Garland, supra;

Green v. Shumway, supra;

Opinion to Rhode Island House of Representatives, supra.

b. Prohibited the appropriation of money to pay salaries to individuals in U. S. government service:

United States v. Lovett, supra.

c. Confiscated all real and personal property and declared individuals to be "aliens":

Cooper v. Telfair, supra;
Sewall v. Lee, supra.

d. Prohibited persons from taking advantage of certain equitable forms of action:

Pierce v. Carskadon, supra.

e. Subjected persons to the surgical operation called vasectomy:

Davis v. Berry, supra.

For all the foregoing reasons, we submit that the statute must be condemned as contrary to the bill of attainder provision of the Constitution. We submit that this point has not heretofore been adjudicated by this Court, so that the "slate" is clean.

II. The statute at bar is, on its face, special legislation which deprives aliens situated like appellant of their rights, privileges, and immunities without due process of law.

The cornerstone of a democracy is that individual rights and privileges are secured by a judicial process of general application; acting equally upon all; serving as the law of the land. Webster, while arguing that a state statute was an act of attainder, gave meaningful content to the process of law:

"By the law of the land, is most clearly intended, the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is, that every citizen

shall hold his life, liberty, property and immunities under the protection of the general rules that govern society." (Emphasis supplied.)⁴

If a legislative act, such as the one at bar, singles out an individual or group of individuals for special favor or condemnation it becomes the servant of tyranny, for it hastens to judgment before the cause may be fairly heard. In brief, rule by legislative fiat dispenses with all those safeguards so carefully established to protect the individual from impassioned mobs and political expediency. It invokes those ugly chapters of not so ancient English history which found a parliament vested with infinite powers, judicial as well as legislative, and a like disposition to exercise them.⁵ This legislative assumption of judicial magistracy, of course, provided the crown with distinct advantages in its continuing quest for additional revenues, one of which appears in the infamous Grand Remonstrance:

"[T]hat it may often fall out that the Commons may have just cause to take exception at some men for being counsellors and yet not charge the men with crimes for *these be grounds of diffidence which lie not in proof.*" (Emphasis supplied.)⁶

The consequence of commingling the two functions surprises no one:

"[A]n act of Parliament was made, that all the Irish people should depart the realm, and go into Ireland before the Feast of the Nativity of the Blessed Lady,

⁴ *Dartmouth College v. Woodward* (1819), 4 Wheat. 517, 581.

⁵ Holsworth, *History of English Law*, Vol. 1, p. 180 et seq. "[T]he judges were obliged to admit that these acts, however morally unjust, must be obeyed." (Ibid., p. 185.) See also: Wooddeson, *Lectures on the Laws of England* (1842), Vol. 2, pp. 499-508.

⁶ Holsworth, *op. cit.*, p. 384.

upon pain of death, which was absolutely *in terrorem*, and was utterly against the law."⁷

Judicial enactment also made unnecessary the presence of the accused during the proceedings—a custom which enabled the Parliament of James II to attain two to three thousand persons, confiscate their property, and sentence them to death unless they presented themselves at a time designated. The contingency was impossible of fulfillment, of course, because the list of those attainted was carefully concealed until after the passage of the appointed time.⁸

And even in America, significantly enough, many of those who helped draft our Constitution were themselves either the victims of or witnesses to the evils flowing from a legislature equipped with judicial power. Two notable examples are the attain of Jefferson,⁹ and the Massachusetts Act of Banishment of September, 1778, which forbade the return to that State of 308 named persons, 65 of whom were Harvard graduates.¹⁰ These, and numerous similar abuses,¹¹ occurred during and immediately following a war (the Revolution), a favorite spawning ground for legislative enactments against unpopular persons and causes (*Cummings v. Missouri* (1866), 4 Wall. 277; *Ex Parte Gar-*

⁷ Proclamations, 12 Co. Rep. 74, 75; 77 Eng. Rep. 1352 (KB. 1610); see: Wormuth, *Legislative Disqualifications as Bills of Attainder*, 4 Vanderbilt Law Review 603, 607, 608.

⁸ Cooley, *Constitutional Limitations* (8th Ed., 1927), pp. 536, 537.

⁹ Clements, *Comments, Cases and Text on Criminal Law and Procedure* (1952), p. 3.

¹⁰ 5 *Acts & Resolves of Massachusetts Bay* 912 (1778); see: Davis, *U. S. v. Lovett and the Attainder Bogey in Modern Legislation*, 30 Washington U. Law Quarterly, pp. 13, 16.

¹¹ Norville, *Bills of Attainder: a rediscovered weapon against discriminatory legislation*, 26 Oregon Law Review 78, 87; Davis, *op. cit.*; Thompson, *Anti-Royalist Legislation During the American Revolution*, 3 Ill. Law Review 81, 147.

land (1866), 4 Wall. 333; *United States v. Lovett* (1950), 328 U. S. 303).

It is scarcely accidental, then, that Congress is without authority to legislate by fiat. In fact,

“‘A government of laws, and not of men’ was the rejection in positive terms of rule by fiat.” (Mr. Justice Frankfurter, concurring, *U. S. v. United Mine Workers of America* (1946), 330 U. S. 258, 307, at p. 308.)

History had provided the authors of our Constitution with cogent reasons for withholding such authority from the Legislature; and they wisely created a third and separate branch of government, the Judiciary, whose independence and impartiality would impart to judgment that objectivity so vital to ordered liberty. Under our constitutional system, therefore,

“No judicial power is vested in the Congress or either branch of it save in the cases [of impeachment and punishment of its own members].” (*Kilbourn v. Thompson* (1880), 103 U. S. 168, 198.)

Such an arrangement is the safest and the surest safeguard against legislative encroachment upon civil liberties.

“[W]hat could be more obnoxious in a free government than the exercise of [judicial] power by a popular body, controlled by mere majority, fresh from the contests of exciting elections, and quite too apt, under the most favorable circumstances, to suspect the motives of their adversaries, and to resort to measures of doubtful propriety to secure party ends?”¹²

Realistically, special legislation is like “frontier law.” Both are born of fear, bigotry and panic; both follow the

¹² Cooley, *op. cit.* pp. 537-538.

assumption that guilt is so obvious that trial would only impede justice. However, due process of law means that neither a mob nor Congress can lynch the guilty. It means that Jews may not be deported qua Jews; nor Republicans qua Republicans.

The constitutional (and imperatively rational) proscription against special legislation is, therefore, to secure to *all* persons a fair and full hearing. *All* persons certainly includes *all* aliens since the latter are entitled to procedural due process of law as a matter of right (*Kwong Hai Chew v. Colding* (1952), 344 U. S. 590, 601; *Galvan v. Press* (1954), 347 U. S. 522, 531). If the procedural safeguards of the Constitution cover all aliens, it reasonably follows that such protection extends even to aliens who were or are members of the Communist Party. Hence, the inexorable conclusion that Congress simply does not possess the power to deport members of the Communist Party, *eo nomine*.

In enacting the statute at bar, Congress has held a legislative trial in which the alien's right to procedural due process of law has been put to a vote. What emerges is a political judgment, posited upon improper evidence, and ordained with no opportunity afforded the alien to be heard. The dreadful possibilities which lay within the grasp of a political body gifted with such powers as Congress has here sought to exercise has too frequently blotted the pages of history. The answer is always the same.

"The legislature cannot be permitted to decide who is guilty of what in the guise of protecting the public. Otherwise, the fate of every citizen will rest not on the rock of constitutional justice but on the shifting sands of legislative pleasure."¹⁴

In the context of the foregoing, we believe that a reconsideration of *Galvan v. Press* is as called for, as reconsidera-

¹⁴ Comment, 53 Yale Law Journal 844, 861 (1954).

tion was given by this Court of the issue of flag salutes by school children. There, after first having upheld the practice in *Minersville School District v. Gobitis*, 310 U. S. 586 (1940), further reflection induced this Court within a few years to reach the opposite conclusion. *W. Virginia State Board v. Barnette*, 319 U. S. 624 (1943).

CONCLUSION

We respectfully submit, therefore, that this judgment should be reversed and deportation of the character here required by the statute declared to be what in fact it is, punishment by legislative fiat which offends both the prohibition against bills of attainder and the requirements of due process. *Galvan v. Press*, should be overruled.

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POLITICAL DEPORTATIONS IN THE UNITED STATES:

A Study in the Enforcement Procedures: 1919-1952 *

Introduction

October 16, 1918, Congress passed an act¹ providing for the deportation from the United States of non-citizens who were members of or affiliated with organizations seeking to overthrow the government of the United States by force and violence.² The first political deportation act (1903)³ had related solely to "alien anarchists," and had been passed after the assassination of President McKinley in 1901 by an American-born anarchist. During the next two decades the public had been urged to change its social philosophy and economic system by such native-born agitators as Socialist Eugene V. Debs, Wobbly William Haywood, syndicalist William Z. Foster, and naturalized citizen Daniel DeLeon, one of the first American followers of Karl Marx.⁴ It had witnessed the sensational trials of

* Although no cases arising after 1952 are discussed herein, discussion of cases arising prior to 1952 is brought up to the present date.

1. 40 Stat. 1012 (1918), 8 U. S. C. 137.

2. "(g) Any alien who was at the time of entering the United States, or has been at any time thereafter, a member of any one of the classes enumerated in this section, shall, upon the warrant of the Attorney General, be taken into custody and deported * * *. The provisions of this section shall be applicable to the classes of aliens mentioned therein, irrespective of the time of their entry into the United States." The enumerated classes include:

"(a) Aliens who are anarchists—(b) Aliens who advise, advocate, or teach, or who are members of or affiliated with any organization, association, society, or group, that advises, advocates, or teaches, opposition to all organized government—(c) Aliens who believe in, advise, advocate, or teach, or who are members of or affiliated with any organization, association, society, or group, that believes in, advises, advocates, or teaches: (1) the overthrow by force or violence of the Government of the United States or of all forms of law, or (2) the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers * * * of the Government of the United States * * * because of his or their official character, or (3) the unlawful damage, injury or destruction of property, or (4) sabotage—(d) Aliens who write, publish, or cause to be written or published, or who knowingly circulate, distribute, print, or display, or knowingly have in their possession for the purpose of circulation, distribution, publication or display, any written or printed matter, advising, advocating, or teaching, opposition to all organized government, or advising, advocating, or teaching * * * [(1), (2), (3) and (4) enumerated above under (c)]—(e) Aliens who are members of or affiliated with any organization, association, society, or group, that writes, circulates, distributes, prints, publishes, or displays, or causes to be written, circulated, distributed, printed, published, or displayed, or that has in its possession for the purpose of circulation, distribution, publication, issue, or display, any written or printed matter of the character described in paragraph (d)."

3. 32 Stat. 1214, 1221 (Mar. 3, 1903).

4. See, for example, Ginger, Ray, *The Bending Cross: A Biography of Eugene Victor Debs* (1949); on Haywood and Industrial Workers of the World, 215-6, 219-20, 234-44; on DeLeon, 96-7, 182-3. Haywood, William D., Bill Haywood's

labor leaders charged with conspiring to use force and violence,⁵ or with the actual use of force and violence;⁶ all of the defendants had been American citizens. Still the belief persisted that radicals were dangerous; that radicals were aliens; that radical ideas had been imported from abroad; that security for this country depended upon the immediate expulsion of radical aliens and their radical ideas. It was this belief which led to the passage of the 1918 act.⁷

The Act made no provisions for administrative hearings to determine whether the particular aliens arrested were in fact "radical" within the definitions of the Act.⁸ Since the courts had ruled that deportation was not a form of punishment,⁹ none of the safeguards available to the defendant in a criminal case were applicable to such aliens. There was no statute of limitations,¹⁰ no

Book (1929); Foster, William Z. *From Bryan to Stalin* (1937).

5. Moyer, Haywood and Pettibone (1906) described in Ginger, op. cit., 244-8, 251-5.

6. J. B. and John J. McNamara (1910) described in Ginger, op. cit., 304-6; Steffens, Lincoln, *The Autobiography of Lincoln Steffens*, 638-89 (1931).

7. The reason for passage of the Act is stated in two 1919 anarchist deportation cases; *ex parte Pettine*, 259 F. 733, 735 (D. C. Mass.), and *Lopez v. Howe*, 259 F. 401. For conflicting views on the history of the Act, see *Strecker v. Kessler*, 95 F. 2d 976, 978 (5th Cir. 1938) and *Kessler v. Strecker*, 307 U. S. 22, 30-1 (1939). In support of Judge Hutcheson's view, see Post, *The Deportations Delirium of Nineteen-Twenty* 63-66 (1923), and I. J. A. Bull. 7 pp. 1-3 (1932). Brief general history given in *Developments in the Law, Immigration and Nationality*, 66 Harv. L. Rev. 643, 644-7, 680. It should be noted in passing that three justices of the Supreme Court (including Justice Field, who wrote the opinion in the *Chinese Exclusion case* (130 U. S. 581)), said that there was no Congressional authority to deport a resident alien, *Fong Yue Ting v. U. S.*, 149 U. S. 698, 733, 743, 756, 760 (1893).

8. See discussion in *Sung v. McGrath*, 339 U. S. 33, at 49 (1950).

9. *Fong Yue Ting v. U. S.*, 149 U. S. 698, 730 (1893); *Johannesen v. U. S.*, 225 U. S. 227, 242 (1912); *Bugajevitz v. Adams*, 228 U. S. 585, 591 (1913); *U. S. ex rel. Bilokumsky v. Tod*, 263 U. S. 149, 154 (1923); all cited with approval in *Harisiades v. Shaughnessy*, 342 U. S. 580, 594 (1952). But see doubts expressed in majority opinion in *Galvan v. Press*, 74 S. Ct. 737, 742 (1954), and in dissents of Black and Douglas, 74 S. Ct. 737, 744.

10. The earlier deportation acts had contained statutes of limitations, see Kasisas, U. S. Immigration, Exclusion and Deportation (2d Edit.) 4 (foreign convicts), 5 (violators of contract labor law), 6 (illegal entrants) (1940). For a comparison with statutes of limitations in various criminal statutes, see "Whom We Shall Welcome", Report of the President's Commission on Immigration and Naturalization 197-8 (1953), (hereafter called "President's Commission Report"). The doctrine of laches does not apply in deportation proceedings: *Restivo v. Clark*, 90 F. 2d 847; but cf. *Petition for Naturalization of John Wasowski*, #306755, N. D. Ill. (March 18, 1946) (Barnes, J.) in which naturalization was granted despite deportation warrant outstanding since 1919. (VI Law. Guild Rev. 559 (1946).)

prohibition of ex post facto laws¹¹ or bills of attainder¹² or guilt by association¹³ or double jeopardy,¹⁴ no requirement of open hearings before an impartial government official¹⁵ or of proof beyond a reasonable doubt,¹⁶ no right to counsel guaranteed at all stages of the proceedings¹⁷ or to purchase a transcript of hearings for use on appeal,¹⁸ no method of appeal to the courts for full judicial review of the proceedings and deportation orders.¹⁹

This political deportation act has remained basically unchanged in the intervening 35 years. Some sections have been altered by Congress in order to specifically overrule decisions by the courts favorable to deportees.²⁰

11. See *Harisiades v. Shaughnessy*, 342 U. S. 580, 593 (1952), and dissent of Mr. Justice Douglas, 598-601.

12. See brief of petitioner, *Quattrone v. Nicholls* (not yet rep.) (#53-4SMC, Mass., decided Feb. 19, 1953.)

13. The Board of Immigration Appeals held that it had not been proved that *Peter Harisiades* personally advocated any proscribed doctrines (see note 152, infra). The U. S. Supreme Court upheld his deportation solely on the ground of his past membership in an organization (the Communist Party) which was found to advocate proscribed doctrines (*Harisiades v. Shaughnessy*, 342 U. S. 580 (1952)), and no courts have reached a contrary decision since.

14. The classic case of repeated arrests and hearings and determinations of deportability on political grounds is that of *Harry Renton Bridges* (see note 26 and 52 Yale L. Jour. 2 (1942) and *Bridges et al. v. U. S.*, 73 S. Ct. 1055 (1953)). Other non-citizens who were re-arrested for deportation after winning their first deportation cases were: *Frank Boric*, *Joseph Strecker*, *Fred Fierstein*, *Jack Schneider*, *Stella Petrosky*. (See Appendices B and C.) See discussion of res judicata issue by Board of Immigration Appeals in its decision in the *Harry R. Bridges* case, 52, note 77 (1942).

15. See description by Dean James M. Landis of the innovations instituted in the first deportation hearings involving *Harry R. Bridges* (1939), In the Matter of *Harry R. Bridges*, Findings and Conclusions of the Trial Examiner 2-3, 4; see discussion of exemption of deportation hearings from provisions of Administrative Procedure Act, note 24.

16. E.g., *U. S. ex rel. Tisi v. Tod*, 264 U. S. 131 (1924); *Fajtauer v. Commrs.*, 273 U. S. 103 (1927).

17. See *Colyer v. Skeffington* for quotations from the rules in force prior to the 1919-1920 mass arrests, and immediately thereafter. (265 F. 17, 46-7 (1920).)

18. See letter from Carol Weiss King, Esq., to Commr. of Immigration at Ellis Island, May 10, 1926 and reply May 12, 1926. King files, New York.

19. The only method of attacking deportation orders in the courts has traditionally been by habeas corpus petitions. (*Kabadian v. Doak*, 65 F. 2d 202, cert. denied *Kowal et al. v. Perkins*, 290 U. S. 661 (1933).) After passage of the Administrative Procedure Act in 1946, attempts were made to apply Sec. 1009 (providing for judicial review of administrative decisions) to deportation orders. (*U. S. ex rel. Lindenau v. Watkins*, 73 F. Supp. 216 (S. D. N. Y. 1947); *U. S. ex rel. Trinler v. Carusi*, 166 F. 2d 457 (3d Cir. 1948); *Francia et al. v. Shaughnessy* (unrep.) (Civ. #63-260, S. D. N. Y. May 29, 1951) (Leibell, J.)). In *Heikkila v. Barber*, 345 U. S. 229 (1953), the Supreme Court held this provision of the A. P. A. inapplicable to deportation orders under the 1917 Act, restating the rule that the only method of attack is by habeas corpus proceedings. In *Rubinstein v. Brownell* (206 F. 2d 449, aff'd 74 S. Ct. ...) the court concluded that injunctive review of deportation proceedings is available under the Immigration Act of 1952. All of the cases studied in this article were tested by habeas corpus except for *Coleman*, *Heikkila* and *Mascitti*, cited in Appendix C.

20. E.g., the 1940 amendment to the Act provided for deportation for past membership in a proscribed organization (54

These statutory changes have consistently limited the burden of proof on the Immigration Service.²¹ The Rules promulgated by the Service guarantee the right to counsel throughout the proceedings²² and counsel are permitted to use transcripts of hearings,²³ but the Rules do not bring deportation hearings within the standards required in all other types of administrative hearings.²⁴

From the beginning the law has been applied to non-citizen members and affiliates of the Communist Party, whether or not such membership had ceased at the time of the deportation arrest.²⁵ No exhaustive proof of the character of that party has been produced

Stat. 673, 8 U. S. C. 137) immediately after the Supreme Court had held that past membership was not covered in the 1918 Act. (*Kessler v. Strecker*, 307 U. S. 22 (1939).) In 1948 Judge Goldsborough in the District Court for the District of Columbia ruled that the Service was bound by the Administrative Procedure Act (60 Stat. 239, 241, 5 U. S. C. 1001, 1006-7) in *Eisler et al. v. Clark*, 77 F. Supp. 610. The Service immediately asked Congress for exempting legislation. No action was taken at the time, but in 1950, after the Supreme Court upheld this view in *Sung v. McGrath* (339 U. S. 33), Congress exempted the Service from most of the provisions of the A. P. A. in a rider to the Emergency Appropriations Act (64 Stat. 1048 (Sept. 1950)).

21. Until 1933 the Bureau of Immigration was in the Department of Labor. The name was changed in that year to the Immigration and Naturalization Service but the Labor Department continued its authority until 1940, when the Service was transferred to the Department of Justice, where it has remained. Hereafter referred to as the Immigration Service or the Service.

In 1930 the 9th Circuit Court of Appeals, in *ex parte Fierstein*, (41 F. 2d 53) refused to take judicial notice of the character of the Communist Party and held that the evidence presented by the Service on this point did not satisfy its burden of proof. The case was sent back for further hearings on this issue. (No such hearings were held until Fierstein was re-arrested in new proceedings in 1946.) Thereafter, in 1932, Cong. Dies proposed an amendment to the 1918 Act providing for deportation for membership in the Communist Party, named in the amendment. (H.R. 12044, 72nd Cong. 1st sess.) This amendment, and a similar one (H.R. 7120, 74th Cong., 1st sess. 1935) were defeated. In 1950 this provision became sec. 22 (1)(C) of the Internal Security Act of 1950 (P.L. 831, Chapter 1024, 81st Cong., 2d sess.), and is found at sec. 241(a)(6)(C) of the Immigration Act of 1952 (66 Stat. 163), hereafter sometimes referred to as the Walter-McCarran Act. The constitutionality of this provision was upheld in *Galvan v. Press*, 74 S. Ct. 737 (1954).

22. Rule 242.53(g), Federal Register, Dec. 19, 1952, p. 11514-5.

23. Information of the authors.

24. The rider to the 1950 Appropriations Act exempting the Service from provisions of the A. P. A. (note 20) was made permanent in the 1952 Immigration Act (8 U. S. C. 155a). The Rules of the Service as to the conduct of hearings in deportation cases do not satisfy the following requirements of the A. P. A., among others; separation of investigative, prosecuting and deciding officers; selection of impartial special inquiry officers through use of rotating lists. In a recent non-political deportation case (*Anthony Pino*), counsel complained that the Special Inquiry Officer, who acted as prosecuting and deciding officer, refused "to furnish counsel with the contents of his dossier on the Pino case". The Boston Daily Globe, Mar. 6, 1953. Other procedural complaints have arisen out of the failure of Congress to require the Service to comply with the A. P. A.

25. Deportation for past membership was ordered in the following cases and upheld in court reviews: *U. S. ex rel. Mannisto v. Reimer*, 77 F. 2d 1021 (2d Cir. 1935), *U. S. ex*

in the deportation hearings.²⁶ The courts have not reviewed the findings of the Service when they were based on "any" evidence or when the denial of due process was not "flagrant".²⁷

The result of a negative decision by the agency and the courts is an order of deportation. The considerations which might be decisive in the sentencing of a defendant in a criminal case are inapplicable here: the number of years since the deportee emigrated from his birthplace, the number of dependents he leaves in this country,²⁸ his age, the number of years since his alleged proscribed activity was concluded, the extent of his activities as a member or affiliate of a proscribed organization, his ability to prove good moral character, his desire to become an American citizen, or even his military service in the U. S. Armed Services. Yet deportation is a form of penalty, although not technically considered "punishment".²⁹ The courts have repeatedly expressed their belief that it may result "in loss of both property and life; or of all that makes life worth living".³⁰ This is particularly clear in cases

rel. Yokinen v. Commr., 57 F. 2d 707 (2d Cir. 1932). However, see case of *John Pappas*, in which the Service cancelled the warrant of arrest on evidence that alien was past member of Communist Party who had joined solely as agent for the local Industrial Association. VI I. J. A. Bull. 102 (1938). And see *Strecker case*, discussed in note 20.

For a list of deportation cases involving Communist Party membership, see Findings and Conclusions of Trial Examiner James M. Landis in the Matter of Harry R. Bridges, note 18, pp. 6-7 (1939).

26. Secretary of Labor Wilson ruled in 1920, in the case of *Engelbert Preis*, that membership in the Communist Party was grounds for deportation under the 1918 Act. (Quoted in full in *Colyer v. Skeffington*, 265 F. 17, 55-7, note 1.) See note 21 above. The two major exceptions involved cases where considerable testimony was taken by the Service and the deportees as to the character of that party: the first and second hearings in the *Bridges* case and the *Harisiades* case. See Transcript of Landis hearing, beginning on pages 4343 and 4566 (1939), and Memorandum of Decision by Charles B. Sears, Presiding Inspector, in the Matter of Harry Renton Bridges, File #55973/217, 22-30 (1941), and Transcript in the Case of Peter Harisiades, File #99183/146, pp. 1-598 of hearings (Oct. 1946 to Jan. 1947). For discussion of the character of the Communist Party by the Supreme Court, see opinion of Justice Murphy in *Schneiderman v. U. S.*, 320 U. S. 118, 149-156 (1943) (denaturalization case); but cf. *Harisiades v. Shaughnessy*, 342 U. S. 580 (1952) and *Galvan v. Press*, 74 S. Ct. 737 (1954).

27. *U. S. ex rel. Tisi v. Tod*, 264 U. S. 131 (1924); *Vajtauer v. Commrs.*, 273 U. S. 103 (1927).

28. The deportation law was amended in 1940, after years of agitation by Immigration officials and others, to provide for suspension of deportation when such banishment from this country would result in economic hardship to American-citizen wives and children of deportees who could prove good moral character. This provision did not apply in political cases until passage of the 1952 Immigration Act (Sec. 244(a)(4)). But see discussion in President's Commission Report, 211-15 (1953) of Congressional intention to grant suspension in only a small fraction of cases, and *U. S. ex rel. Accardi v. Shaughnessy*, 74 S. Ct. 499 (1954), (a non-political case.)

29. See note 9, *supra*.

30. Brandeis, J. in *Ng Fung Ho v. White*, 259 U. S. 276, 284 (1922); similar expressions in *U. S. ex rel. Klonis v. Davis*, 13 F. 2d 630 (2d Cir. 1926); *Wallis v. Tecchio*, 65 F. 2d 250, 252 (5th Cir. 1933); *Di Pasquale v. Karnuth*, 158 F. 2d 878,

in which the non-citizen came to this country at such an early age that he never learned his "native" tongue, and in other cases in which his birthplace is now part of a different country than when he emigrated. (And the Immigration Act of 1952³¹ expressly provides that a non-citizen can be deported to any country which will accept him for permanent residence, whether or not he has ever lived or even visited there in the past.³²)

It has been clear from its inception that the political deportation law may need revision, and certainly needs scrutiny. Congressional hearings were held concerning the 5,000 to 6,000 political deportation arrests made under orders of Attorney General A. Mitchell Palmer in November 1919 and January 1920,³³ and the subsequent decisions by Assistant Secretary of Labor Louis F. Post in cases based on those arrests.³⁴ A leading segment of the Bar likewise concerned itself with the deportation enforcement procedures in that period.³⁵ In 1931 President Hoover appointed the National Commission on Law Observance and Enforcement (Wickersham Commission), which made a report on "The Enforcement of the Deportation Laws of the United States" and recommended changes in the law and procedures.³⁶ The Committee on Ellis Island, appointed by Secretary of Labor Perkins, likewise proposed changes in its 1934 Report.³⁷ Shortly before the Immigration Service was transferred to the Department of Justice in 1940, and again after the transfer, studies were made of unfair administrative procedures followed in governmental agencies, including the Serv-

879 (2d Cir. 1947); James Madison, 4 Elliott Debates on the Federal Constitution 555 (1798). See attitude of Asst. Secy. of Labor Post, op. cit. 253-55 (1923). In *Barber v. Gonzales*, 74 S. Ct. (1954), Mr. Chief Justice Warren reiterated this view for the majority: "Although not penal in character, deportation statutes as a practical matter may inflict 'the equivalent of banishment or exile,' * * * and should be strictly construed."

31. 66 Stat. 163 (1952).

32. Sec. 243(a)(7). E.g., *Anna Taffler*, undeportable to the country where she was born, was ordered by the Immigration Service in May, 1954 to apply for permission to enter Israel, because she is of the Jewish faith, although she has never lived in Israel. (See citation in Appendix C.)

33. See Appendix A, notes 1 and 2.

34. *Ibid.*, note 3.

35. *Ibid.*, note 6. Among the attorneys who handled deportation cases arising out of the Palmer Raids in 1919-1920 (some of whom later testified before Congressional committees) were: Benjamin C. Bachrach, Chicago; Charles A. Karch, E. St. Louis; John Lord O'Brian, Buffalo; Charles Recht, Swinburne Hale, Walter Nelles, Isaac Shorr, New York City; F. E. Steelwagen and Fred M. Butzel (later Michigan Supreme Court Justice), Detroit; ex-Sen. Hardwick (later Governor of Georgia).

36. For a list of studies and articles growing out of the Wickersham Report, see Oppenheimer, Recent Developments in the Deportation Process, 36 Mich. L. Rev. 355, 357 (1938).

37. Particularly as to administrative procedures. See Report of the Ellis Island Committee 7 (1934), quoted in Oppenheimer, op. cit. 36 Mich. L. Rev. 355, 381.

ice.³⁸ Extensive Congressional hearings were held in 1951 prior to passage of the Immigration Act of 1952. After its passage, but before its effective date, President Truman appointed a Commission on Immigration and Naturalization³⁹ to sound out public opinion and report on the wisdom of enforcing this Act. The Commission's report was published January 1, 1953, one week after the Act went into operation, and contains many recommendations for changing the handling of political deportation cases.⁴⁰ President Eisenhower indicated in April, 1953⁴¹ that many sections of the Act need further study, including the section on political deportations.

But the only one of these studies which was actually based upon the records of the Immigration Service was the report of the Wickersham Commission of 1931, prepared by Reuben Oppenheimer of the Baltimore Bar.⁴² The other reports were based on oral testimony of interested persons and supported by cases chosen as examples of particular abuses. While they were all carefully prepared, their conclusions are not subject to statistical verification. Research in this field is difficult. This can be indicated most easily in connection with a description of the steps in the usual political deportation case arising between 1919 and 1952: The non-citizen was arrested by means of a warrant and a hearing was held before a hearing officer of the Immigration Service to determine whether the charges contained in the warrant were true. The transcript of this hearing was not made available to the public. On the contrary, the attorney for the deportee obtained his copy from the Service, which required him to agree not to show the transcript to any other person (including another attorney) and to return the transcript to the Service upon the conclusion

of the case.⁴³ The decision of the hearing officer was not made public, and the file in the case was closed to all except the attorney of record in the case. If the decision of the hearing officer was adverse, the deportee could appeal to the Board of Immigration Appeals. But until 1947 the decisions of this Board were likewise not published.⁴⁴ Since 1947,⁴⁵ the Service has published three volumes of administrative decisions in immigration cases, starting with August 1940 (when the Service was transferred from the Department of Labor to the Department of Justice⁴⁶ and when the Board of Immigration Appeals was established). But there has been no indication that decisions of its predecessor, Board of Review, made prior to August 1940 will ever be printed. The situation is the same as to decisions by the Attorney General on appeals from adverse rulings of the B. I. A. At this point the deportee could test the validity of the deportation order in the courts, but only by means of an ancillary attack by petition for writ of habeas corpus.⁴⁷ Very often the decisions of the Federal District Courts were unreported,⁴⁸ and the decisions of the Courts of Appeals were frequently mere memoranda affirming the order of the lower court.⁴⁹ The Supreme Court denied certiorari in several political deportation cases and actually heard and decided only eight political deportation cases in the period covered, 1919-1952.⁵⁰

43. Information of the authors. See agreements regularly attached to transcripts to be signed by attorneys in deportation cases.

44. Except for the findings and conclusions of the hearing officers in the first and second deportation hearings re *Harry Bridges*, which were published by the Service. See note 26.

45. The volumes were published "pursuant to the requirement of Section 3(b) of the Administrative Procedure Act", and entitled "Administrative Decisions under Immigration & Nationality Laws", see Vol. I, p. III. (1947).

46. Reorganization Plan No. V, transmitted to Congress May 22, 1940 by Pres. Roosevelt.

47. Statistics on court tests in Wickersham Report 111-12, and Oppenheimer, op. cit., 36, Mich. L. Rev. 358. See Appendix A for 5 court tests of deportation orders in 1920; Appendix B for 30 court tests (out of 53 cases studied) in 1930-1937 period; Appendix C for 10 court tests (out of 219 cases studied) in 1944-52 period; (other cases cited related to granting of bail or other issues). See note 19 re new method of review of deportation orders.

48. See Appendix C for numerous examples of unreported cases.

49. E.g., *U. S. ex rel. Ferrer v. Commr.*, District Court decision unreported, 86 F. 2d 1021 (Memo.), cert. denied 300 U. S. 653, (1937), and *Ujich v. Commr.*, District Court decision unreported, 75 F. 2d 1022 (Memo.), cert. denied 295 U. S. 746 (1935).

50. The eight cases heard by the Court were: *Bilckumsky v. Tod*, 263 U. S. 149 (1923), *Mahler et al. v. Eby*, 264 U. S. 32 (1924), *Tisi v. Tod*, 264 U. S. 131 (1924), *Menserich v. Tod*, 264 U. S. 134 (1924), *Vajtauer v. Commrs.*, 273 U. S. 103 (1927), *Kessler v. Strecker*, 307 U. S. 22 (1939), *Bridges v. Wixon*, 326 U. S. 135 (1945), *Harisiades v. Shaughnessy*, 342 U. S. 580 (1952). Cert. was granted in *U. S. ex rel. Boric v. Marshall*, 290 U. S. 623 (1933) but the case was not argued because the Service offered to cancel the warrant of arrest if the alien would withdraw his petition for certiorari, which was done, (290 U. S. 709). Cert. was also granted in *Martinez v.*

38. See *Sung v. McGrath*, 339 U. S. 33, 36-45 (1950) for a brief history of the studies which led to passage of Administrative Procedure Act, and President's Commission Report 155-58, for a short summary of the findings of the Dimock Committee, and other studies. See also statement of Ralph T. Seward, Chairman, Board of Review, Department of Labor in Proceedings, 4th Annual Conference, American Committee for Protection of Foreign Born, March 1940, 42-5. Report on the Immigration and Naturalization Systems of the United States by the Senate Committee on the Judiciary (Apr. 20, 1950) (91st Cong., 2d Sess., Rep. 1515) served as the basis for much of the 1950 Internal Security Act and the subsequent 1952 Immigration Act. See pp. 781-801 for discussion of "Subversives", "Communism as an Alien Force" and "The Law".

39. Executive Order 10392 (Sept. 4, 1952).

40. President's Commission Report 226, 228, 231, 266.

41. Letter from Pres. Eisenhower to Sen. Arthur V. Watkins, dated April 6, 1953, quoted in NYTimes April 28, 1952, pp. 1 and 21.

42. Oppenheimer studied every 20th (later every 50th) case in chronological order in the files of the Immigration Bureau (then in the Labor Department) from July 1, 1928 to June 20, 1929, a total of 453 cases involving 496 persons. Wickersham Report 29.

In unreported cases and cases which never reached the courts, counsel for the deportees are the only source of information open to persons outside the Immigration Service.

The difficulty of obtaining information does not, however, eliminate the necessity for evaluating the enforcement of the political deportation act of 1918. It is the purpose of this article to consider this question in three parts: a) To what extent, and in what sense, have the persons arrested for deportation on political grounds been "aliens"? b) To what extent, and in what sense, have they been shown to be persons who sought to overthrow the United States government by force and violence? c) What proportion of the persons arrested for deportation on these grounds have actually been expelled from the United States?

The answers to these questions have been sought through study of political deportation cases in three periods: 1919-1920, 1930-1937, 1944-1952. The first period was chosen for study because it involved the first large-scale application of the 1918 Act and the number of arrests was larger than in the entire period since 1920;⁵¹ some of the methods used by the Immigration Bureau and the Justice Department at that time were continued in the second and third periods, and there is considerable material available about the period from semi-official sources⁵² and a few court cases.⁵³

Nelly, 73 S. Ct. 39 (1953), but the Court split 4-4, 1 not voting, so the decision of the 7th Cir. was upheld without opinion. *Heikkila v. Barber* was decided in the spring of 1953 (73 S. Ct. 603); *Galvan v. Press* was decided May, 1954 (74 S. Ct. 737).

51. Approximately 5,000 to 6,000 political deportation arrests were made in 1919-1920. It is impossible for anyone outside the Immigration Service to determine the exact number of political deportation arrests made since that time. Appendix D shows that 930 political deportees have been expelled from this country between 1921 and 1952. Since the Immigration Bureau did not engage in large-scale mass arrests after 1919-1920, it seems likely that no more than two or three times this number of persons were arrested in this period, or around 3,000. The figure 375 post-World War II cases seems to include almost all of the arrests made (see Appendix C, note 1). The total arrests from 1921 to 1952 therefore would probably not exceed 3,300 or 3,500.

52. See Appendix A.

53. One of the reasons that so few of the cases in this period were appealed to the courts was the rules which Asst. Secretary of Labor Post established for deciding the cases which came before him: (1) No deportations to be ordered on basis of evidence procured illegally, such as admissions of aliens when not warned of their rights, when not permitted to consult counsel, when held illegally without warrants of arrest, or when exhibits were seized without warrants. (Post, op. cit. 185, 216.) (2) No deportations to be ordered for membership in proscribed organization when aliens were not aware of the nature of the organization. (Post, 179-80). (3) No deportations to be ordered for membership in proscribed organization when membership was concluded before passage of Act of 1918 making such membership a ground for deportation. (Post, 175). (4) No deportations ordered for past membership in proscribed organization when withdrawal was not due to desire to escape deportation or to serve group

Relatively few political deportation cases arose between 1922 and 1930,⁵⁴ but 244 arose between 1930 and 1937, at the end of the Hoover administration and the beginning of the New Deal. Information was available to the authors in fifty-three of these cases: thirty cases were appealed to the courts⁵⁵ and in the others the attorneys wrote up the facts.⁵⁶ While this sample is small (less than 22% of the cases which ended in deportation), it includes all of the cases cited by the various courts in their opinions in political deportation matters and it seems plausible to generalize on certain limited aspects of the cases in which the data is almost uniform.

The post-World War II period similarly followed years (1939-44) in which very few political deportation cases arose.⁵⁷ 219 cases from 1944-1952 were studied. This is a large enough proportion of the total political deportation cases in the period (375)⁵⁸ to provide a reliable sample. Since the majority of the cases are still pending, and many of them (sixty-seven) have been before the courts at least once,⁵⁹ it was possible to obtain more detailed information about the individual cases than in the other two periods. This additional material for the third period is included as an aid in reaching accurate answers to the questions posed, even though similar information was not available for the earlier periods.

* * *

secretly, but in good faith. (Post, 181, 185). (5) Discretionary relief to apply in political cases: Post decided all doubts in favor of deportees who had dependent wives or children who were U. S. citizens, and Secretary of Labor Wilson ordered that no aliens should be deported on the S.S. Buford who had wives or children in U. S. (Post, 187, 5). (6) No deportations to be ordered to countries where aliens would be subjected to physical persecution if this fact was common knowledge, e.g., Post ordered that Emma Goldman and Alexander Berkman, well-known anarchists, should be deported to "Red" Russia and not "White" Russia, and prevented the deportation of one Magon to Mexico for the same reason. (Post, 18, 21, 169-71).

The cases which went to the Supreme Court (*Bilokumsky*, *Mahler*, *Tisi*, *Mensevich* and *Vajtauer*, cited in note 50) all arose after the abuses complained of in *Colyer v. Skeffington* (265 F. 17 (1920)) had largely ended and the Immigration Bureau and Department of Labor had returned to their customary procedures and rules.

54. See Appendix D for number of political deportations effected each year from 1908 to 1952.

55. Cited in Appendix B; Oppenheimer gave these reasons for "small proportion of court proceedings": "absence of counsel, * * * lack of funds, and * * * realization of limited scope of judicial review." Wickersham Report 111-12 (1931).

56. In the Bulletin of the International Juridical Association, published monthly between May 1932 and December 1942.

57. See Appendix D.

58. The figure 375 was arrived at as follows: the Immigration Service listed 292 political deportation cases pending in December, 1951 (see Appendix C, note 1). The authors studied 144 of these cases, plus 75 cases not listed by the Service. 292 cases plus 75 gives a total of 367 cases.

59. See citations in Appendix C.

I. To what extent, and in what sense, have the persons arrested for deportation on political grounds been "aliens"?

A. The legal definition of "alien".

The 1918 political deportation act relates solely to "aliens". An "alien" is, by legal definition, "one born out of the jurisdiction of the United States and who has not been naturalized under their Constitution and laws".⁶⁰ Were the persons arrested in the three periods studied "aliens" within this definition?

1. 1919-1920:

The Immigration Bureau of the Labor Department was charged with the sole responsibility for enforcing the deportation laws at this time.⁶¹ It issued approximately 600 warrants of arrest under the 1918 Act in the fall of 1919. On November 7, 1919, agents of the Justice Department conducted raids in eleven cities on buildings containing offices of the Federation of Unions of Russian Workers, and executed approximately 452 of the warrants on this date. In most instances everyone in the building was arrested and all were taken to the Justice Department offices where they were questioned by agents of that Department. Those who could prove that they were citizens were immediately released; non-citizens were then turned over to the Immigration Bureau of the Labor Department.⁶² After the warrants were matched-up with the persons arrested, telegraphic warrants were applied for and issued in Washington for the remaining deportees.

On the night of January 2, 1920 between 2,500 and 5,000 arrests were made in thirty-three cities. The procedure was similar to the earlier raids: everyone who had been arrested was questioned by Justice Department agents; citizens were released and non-citizens turned over to Immigration officials. Approximately 6,000 warrants had been issued by the Labor Department, presumably all relating to non-citizens. But the arrests were carried out by seizing everyone in entire buildings where foreign-language or Communist meetings were in progress in some rooms, and little or no effort was made to separate citizens from non-citizens or to arrest solely by delivering warrants to individual aliens.⁶³

⁶⁰ From Kent's Commentaries 50, as quoted in Baldwin's Student Edition of Bouvier's Law Dictionary 64 (1940).

⁶¹ *Colyer v. Skeffington*, 265 F. 17, 28 (1920).

⁶² Post, op. cit. 34-5, quoting from NYTimes Nov. 9, 1919; Report upon the Illegal Practices of the United States Department of Justice, (National Popular Government League, Washington, D. C., May 1920) 11. (Hereafter cited as Report on Illegal Practices).

⁶³ Report on Illegal Practices 4; testimony of Sedar Serschuk before Judge Anderson in *Colyer v. Skeffington*: "When

Of the 5 to 6,000 persons arrested in this manner, between 1500 and 1800 were released immediately and were therefore never turned over to the Immigration Bureau or served with warrants of arrest for deportation.⁶⁴ Two categories of persons were released: citizens (or, more particularly, citizens who could prove their status) and non-citizens who clearly did not come within the purview of the 1918 Act. In view of the breadth of the Justice Department definition of an "alien radical",⁶⁵ it is not likely that many of those released immediately came in the second category. It is also clear that a few citizens were turned over to the Immigration Bureau by mistake, and, by similar mistake, incarcerated in various detention centers set up to hold the thousands arrested.⁶⁶

In this period, then, approximately 30% of those arrested in the course of the enforcement of the 1918 Act were in fact citizens to whom the Act had no application and over whom the Immigration Bureau of the Labor Department had no jurisdiction. (The Justice Department had no jurisdiction over these citizens since their arrests were under a statute involving the Labor Department alone; nor did the Justice Department have any jurisdiction over the 3500 to 4500 non-citizens similarly arrested.)

2. 1930-1937:

The Immigration Bureau of the Department of Labor made a number of arrests in this period by means of raids resembling, in some respects, the two large Palmer Raids. For example, in 1931 twenty policemen and twenty-five Immigration inspectors of the Seattle District entered a meeting of the Communist Party at its headquarters. Everyone present was examined as to his citizenship status and five persons were taken to the U. S. Detention station, where they were examined, held overnight, examined again, and then held awaiting telegraphic warrants issued two days later in Washington. Thereafter deportation hearings were held.⁶⁷ Three other deportees (of the group studied) were arrested under

the agent of the Department of Justice began to search his room, he said to them: 'If you want to arrest me, show me your warrant. He showed me his list, and said, "This is your warrant," and continued to search the room.' (265 F. 17, 75).

⁶⁴ Statistics were compiled from: Post's own records (Post, op. cit. 27, 155, 159, 166-7, 187, 192); Post's presentation of the relevant sections of the Annual Report, Commissioner General of Immigration 1919-1920 (Post 166-7); A. C. L. U., "Since the Buford Sailed" 3, 13. For summaries by areas, see Post: New York, 107; New Jersey, 109; Pittsburgh, 115; Buffalo, 116-19; Portland, 124-5; Chicago, 129; Detroit, 144, 146.

⁶⁵ *Colyer v. Skeffington*, 265 F. 17, 48-9 (1920).

⁶⁶ See testimony taken in *Colyer* case as abstracted in Report on Illegal Practices 55 (1920).

⁶⁷ *Wolck v. Wecdin*, 58 F. 2d 928 (9th Cir. 1932).

similar circumstances,⁶⁸ and information is available concerning raids by Immigration officials in Chicago in August, 1932, involving fifty persons arrested without warrants, at Unemployed Council and Communist Party meetings, including five citizens.⁶⁹

After a change in the national administration, in the spring of 1933, three citizens were arrested for deportation in connection with trade union organizing work,⁷⁰ and fifty-one seamen were arrested for resisting eviction from the YMCA where they were living, of whom fifteen were held, without warrants, for deportation. Altogether eighty-two arrests for political deportation were made between March and September, 1933. Of this number thirty-nine were released because they were citizens.⁷¹

The customary procedure, however, was to question a group of persons at their gathering place and then arrest only the non-citizens for deportation. All of the fifty-three political deportees studied in this period were non-citizens.

3. 1944-1952:

The Immigration and Naturalization Service of the Department of Justice made approximately 375 arrests for deportation on political grounds in this period. In all of the 219 cases studied the deportees were "aliens" by legal definition (or the Justice Department presented evidence to refute claims of citizenship made in a few cases). It is doubtful that any of the persons arrested in this period under the 1918 Act were clearly citizens.

B. The sociological concept of "alien".

There is, in addition to the legal definition of an "alien", a sociological concept involved. The writings of Holmes,⁷² Brandeis,⁷³ Pound⁷⁴ and others have

made clear to modern legal scholars that such concepts cannot be ignored if the law is to serve the ends of justice. This is particularly true in a field such as deportation for political beliefs, in which the purpose sought to be accomplished is the protection of American citizens from that which is foreign. In this view, the extent to which a deportee is not sociologically an "alien" should properly affect the decision as to his deportability.

Webster's New World Dictionary of the American Language (1951) defines the word "alien" as "belonging to another country or people; foreign; strange." In addition to the legal meaning, discussed above, it continues: "a foreigner", "an outsider", as "alien to, strange to; not natural to; not in harmony with." Under this definition a person would cease to be an alien after he had lived in a country for a number of years, learned its language, studied in its schools or worked in its industries, built a family of citizens and given up ties with the "old country".

President Truman's Commission recommended that:

"Alien members or affiliates of subversive organizations who were lawfully admitted to the United States for permanent residence prior to reaching the age of 16 years, or who were lawfully admitted for permanent residence and have resided in the United States continuously for at least 20 years, should not be subject to deportation, but should be dealt with in the same manner as subversive citizens."⁷⁵

The rationale behind this recommendation is stated in explicitly sociological terms:

Aliens who are present members of proscribed organizations "should be deported except where they entered the United States at an early age or have been residents for such a long period of time as to have become the responsibility of the United States."⁷⁶

The Italian government recently expressed its agreement with this view when it issued orders to agents at its borders to turn back all undesirable immigrants from the United States, specifically including persons born in Italy who came to the United States, became citizens here, then were denaturalized and deported back to Italy. Implicit in this decision is the feeling that these people came to America at an early age, entered into criminal activities here and are now the

68. *Anderson, Ohm, Vilarino*, citations in Appendix B.

69. I I J. A. Bull. 5, p. 1 (1932). August 12, 1932, in White Plains, New York, a citizen was tried for unlawful assembly, (speaking without a permit at an Unemployed Council open air meeting.) Before the case was heard, the judge ordered the courtroom cleared. As spectators filed out, they were surrounded by police and 42 were arrested, taken to police headquarters and there questioned by Labor Department officials. 12 were unable to produce citizenship papers or other satisfactory evidence of their right to remain in the U. S. and were immediately sent to Ellis Island. (I I J. A. Bull. 4, p. 3 (1932).)

70. *June Croll*, in Providence, R. I., while working with National Textile Workers Union; *Max Garfunkel* in Pittsburgh, Pa.; *Cross Mischief* in Detroit in connection with Briggs auto strike. II I. J. A. Bull. 4, p. 8 (1933).

71. *Ibid.*; see also Wickersham Report 55-6 (1931).

72. Particularly "The Common Law" 1-2, 35, 36 ("The life of the law has not been logic; it has been experience..."); and dissents in *Vegeahn v. Guntner*, 167 Mass. 92, 104 (1896), *Lochner v. N. Y.*, 198 U. S. 45, 74 (1905), and *Truax v. Corrigan*, 257 U. S. 312, 342 (1921).

73. For example, dissent in *Truax v. Corrigan*, 257 U. S. 312, 354 at 354-5 (1921).

74. "The Scope and Purpose of Sociological Jurisprudence", 24 Harv. L. Rev. 591 (1910-11), 25 Harv. L. Rev. 140 and 489 (1911-12).

75. President's Commission Report 226.

76. *Ibid.* 266 and see discussion of "Wrongdoers Produced by our Society" at 201-2.

responsibility of the American, not the Italian, government. Members of parliament have expressed "mounting resentment" at the idea of using Italy as "a penal colony for America."⁷⁷ While this ruling was limited to persons who had gained American citizenship and then been denaturalized and deported, the underlying theory is equally applicable to those with long residence in the United States who never became citizens.

Assuming the validity of this sociological factor, it is worthwhile to examine the extent to which the political deportees in the three periods were "aliens" and the extent to which they had become Americanized while remaining non-citizens. Study of cases in the three periods provided specific information on: deportees' length of residence in U. S. at the time of arrest, their family status, and the number who had applied for American citizenship.

1. 1919-1920:

No statistical material is available as to the non-citizens arrested for deportation during the Palmer Raids. However, a tentative portrait of these deportees can be pieced together from statements by Judge Anderson (who heard extensive testimony in the *Colyer* case⁷⁸ in the spring of 1920), Assistant Secretary of Labor Louis F. Post⁷⁹ (who decided approximately 4,000 cases for the Labor Department during this period), and affidavits of some of those arrested (collected by the committee of twelve lawyers⁸⁰).

Thomas Truss⁸¹ was characterized by Post as a typical non-citizen arrested in the Raids. He was slightly over thirty years of age, a resident of the United States for twelve or thirteen years, married, with three American-born children. He was a coat-presser by occupation and a leader in his labor union and church; a man of good reputation in his community. He was a national of Poland, although a large number of those arrested were Russian.

Family status: One indication of the family responsibilities of the persons arrested can be found in connection with the first Raid. 184 persons arrested on November 7, 1919 were deported on the *S.S. Buford* just before Christmas, 1919, on such short notice that they were not able to settle all their affairs. Secretary of Labor Wilson had ordered that no married persons were to be deported on the *Buford*, but this order was

not obeyed at the Ellis Island station. Post noted that over half the group did leave families in this country.⁸²

Number of deportees who had applied for U. S. citizenship: It is doubtful that many of the non-citizens arrested in this period had sought American citizenship or had served in the American Army in World War I, although no information is available on either point.

Integration into American community: Relatively few of those who sought relief in the courts were well-acquainted with the English language, and many of the deportation hearings required the use of interpreters.⁸³ The extent to which the deportees had become integrated into the American communities in which they lived is unknown.

2. 1930-1937:

TABLE 1
LENGTH OF RESIDENCE IN U. S. OF 53 POLITICAL
DEPORTEES: 1930-1937⁸⁴

No. of years in U. S. when arrested	No. of deportees cumulative
Over 21 years	9
Over 11 years	20
10 years or less.....	12
Total known	32
Total not known.....	21
Total studied	53

Under the recommendations of the President's Commission,⁸⁵ nine of the thirty-two (28%) would not have been subject to deportation proceedings, because they had become the responsibility of this government through their long (21-year) residence here. They would have been treated like citizens and prosecuted for any violations of the criminal law.

Family status: At least ten of the group of fifty-three were married, and at least two of these had American-citizen wives. Nine of the group had children. (The cases included fifty-one men and two women, one of whom was the sole support of her eight children.⁸⁶)

82. After the *Buford* had been at sea for several days, these 100 deportees requested permission to dispose of their property in this country by signing powers of attorney to be sent to their families here, which was granted. An inference that at least some of the deportees had been working steadily in this country may be drawn from the fact that the 100 men thus released \$45,470.39 in wages due, bank accounts, Liberty Bonds, and so forth. Post, op. cit., 5, 6. (1923).

83. *Colyer v. Skeffington*, 265 F. 17, 74 (1920).

84. Based on cases cited in Appendix B.

85. Quoted supra, p. 99.

86. *Stella Petroskey*, IV I. J. A. Bull. 4, p. 7 (1935); re-arrested for deportation in August, 1953.

77. The Boston Daily Globe, Jan. 1, 1953, p. 1.

78. *Colyer v. Skeffington*, 265 F. 17 (1920).

79. Author of "The Deportations Delirium of Nineteen-Twenty", subtitled "A personal narrative of an historic official experience" (1923).

80. See Appendix A, item (6).

81. Post, op. cit. 206. Truss was arrested by means of a ruse and held incommunicado for one day, then held a week before being released on bail (207).

Number of fifty-three deportees who had applied for citizenship: One non-citizen was arrested for deportation after he voluntarily stated to a naturalization inspector that he had been a member of the Communist Party for four months in 1932.⁸⁷ Nothing is known about citizenship applications made by the other deportees.

Integration into American community: Even assuming that all of the deportees for whom facts are not known had resided here less than ten years, 38% of the group studied had lived in this country ten years or more. 17% had lived here over twenty-one years. While mere residence does not prove integration or the loss of foreign ties, this fact becomes significant in connection with the types of activities in which the deportees were engaged. (See Tables 3 and 6.) The unemployed councils, trade union organizing drives and strikes, demonstrations against Hitler's government in Germany and Mussolini's in Italy—all these activities of the early 1930s were largely led by native-born Americans, and the majority of the participants were likewise citizens. The fact that twenty-four or more of the fifty-three studied also participated in these activities might lead to the conclusion that they were more, rather than less, integrated into the life of America at that time.

3. 1944-1952:

TABLE 2

LENGTH OF RESIDENCE IN U. S. OF 219 POLITICAL DEPORTEES: 1944-1952⁸⁸

No. of years in U. S. in Jan., 1952 ⁸⁹	Cumulative	
	No.	%
Over 41 years	35	18
Over 31 years	125	63
Over 21 years	190	96
Over 10 years	194	98
Under 10 years ⁹⁰	4	2
Total known	198	100
Total not known	21	
Total studied	219	

Sixty-eight out of 195 of the deportees arrived here before they reached sixteen years of age (35%), and almost two-thirds lived here during the Palmer Raids and continuously thereafter.

Under the recommendation of the President's Commission, quoted above, 96% of the deportees for whom facts are available would not be subject to deportation because resident here for more than twenty years.

87. Joseph Strecker, *Kessler v. Strecker*, 307 U. S. 22 (1939).

88. Based on cases cited in Appendix C.

89. Or as of date of conclusion of case (through deportation, voluntary departure, cancellation of warrant, or death.)

and 35% would be undeportable on the additional ground of arriving here prior to their sixteenth birthdays.

Family status: 185 men and thirty-four women comprised the group studied. Half of these deportees were married, including sixty-nine married to citizens. 101 are parents of citizen-children and twenty-four have sons who fought in World War II or are currently in the Armed Services. At least twenty-one are grandparents and two or more are great-grandparents of American citizens. Of the thirty-four women deportees, twenty-seven are married and two are widows. Sixteen are married to citizen-husbands and seventeen have citizen-children. There are six couples in which both husband and wife have been arrested for deportation.⁹¹

Number of 219 deportees who had applied for citizenship: At least eighty-three had applied for citizenship one or more times (46% of the 181 for whom facts are available), and fifty-one such applications were pending at the time of the arrests.⁹² At least five of the eighty-three were arrested on the basis of voluntary admissions they made when being interviewed by Immigration agents concerning their citizenship applications, and this is probably a low figure.⁹³ Although five of the 219 deportees served in the U. S. Armed Forces in World War II, only one⁹⁴ was able to take advantage of the provisions for naturalization of non-citizen soldiers;⁹⁵ his deportation warrant was cancelled following his naturalization.

90. This figure includes *Gerhardt* and *Hilde Eisler*, who never intended to come to or remain in the U. S. but were interned (because of their nationality) on their way to Mexico when World War II began.

91. In several instances the husbands and wives are subject to deportation to different countries.

92. One had been naturalized and denaturalized in 1941; 2 had been recommended for citizenship by the Service, but these recommendations were later withdrawn and warrants for deportation were substituted; 1 arrived in U. S. in 1906, became naturalized, lost citizenship when married to an alien prior to 1924; 1 was permitted by the Service to adjust his status so that he could become naturalized. For an illuminating discussion of the tactics of naturalization examiners, see *Petition of F.*, 73 F. Supp. 655 (S. D. N. Y. 1947), a non-political case.

93. These 5 instances are all known to the authors personally. The number of non-citizens, active in political or trade union affairs, who applied for citizenship decreased during periods in which courts upheld deportation for political belief (1930's), and as a result of political questions asked of aliens under 1940 Alien Registration Act (otherwise known as the Smith Act), and the continued deportation actions against Harry Bridges. During World War II many applications for citizenship were made by this group, probably influenced in part by the decision of the Supreme Court in *Schneiderman v. U. S.*, 320 U. S. 118 (1943).

94. *Harry Bersin*.

95. See Sec. 328, Immigration Act of 1952 for current provisions.

Integration into American community: It is clear that the majority of the deportees studied actively opposed deportation; a number stated specifically at their deportation hearings that they considered this country their home and that they had no ties whatever with their countries of birth.⁹⁶ Some twenty-one were officers in local or international trade unions at the time of their arrests, mainly in elective positions, and stated this fact as proof of their acceptance by their fellow-Americans.⁹⁷ In less than 4% of the cases did townspeople testify against the deportees at any stage of the proceedings,⁹⁸ and in several cases favorable testimony was given by citizen-friends and acquaintances.

II. To what extent, and in what sense, have political deportees been shown to be persons who sought to overthrow the United States government by force and violence?

The government charged political deportees with seeking the violent overthrow of the U. S. government. The political activities of the deportees at the time of their arrests serve as one indication of the validity of this charge. The dates and character of the deportees' actual political activity are more significant and can be ascertained from transcripts of deportation hearings and material brought to the attention of the courts when writs of habeas corpus were applied for (following denial of bail by the government). Some further pertinent information is presented concerning the extent of the criminal records of the deportees, their age and sex (in connection with their ability to actively further the overthrow of the government), and the number who served honorably in the U. S. Armed Forces.

A. The political activities of deportees at the time of their arrest.

1. 1919-1920:

In the spring of 1919 three groups of bombs were found in the U. S. Mails, addressed to leading government officials, including Attorney General A. Mitchell

96. See, e.g., statement of *Benny Saltzman* at conclusion of his deportation hearing (files of the late C. King, Esq., New York) and editorial of N. Y. Post, "Cruel and Inhuman", concerning his case, Jan. 26, 1951.

97. *Karl Latva* is a member of the auxiliary police force in his small community; *Martin Karasek* received commendatory letters from his local AFL union and the chief of police in his town, indicating that he is "an old resident, and has spent most of his life here." The vicar-general of the archdiocese of Portland, a city councilman and the president of the Intl. Woodworkers of America-CIO testified in the deportation hearing of *John Fougrouse* as to his good character, etc.

98. E.g., in the case of *Otto Skog*, A 4-519-994, the hostile testimony of a former friend was given no credence by the Board of Immigration Appeals in its opinion Jan. 5, 1952, and the deportation warrant was cancelled.

Palmer.⁹⁹ In the late summer of 1919, following the Russian Revolution, the Socialist Party of the United States split into three groups: Socialist, Communist and Communist Labor parties.¹⁰⁰ In the fall of 1919 the Department of Justice received a deficiency appropriation to deal with the enforcement of criminal laws against bomb-throwers,¹⁰¹ and it participated in discussions with officials of the Labor Department concerning the arrest for deportation of "alien radicals".¹⁰²

As recounted above, on November 7, 1919 and January 2, 1920, Justice Department agents conducted raids in close to fifty cities. The majority of arrests were made at meeting halls housing the Federation of Unions of Russian Workers or the Socialist or Communist parties. Everyone in the buildings was arrested, so that all the musicians in a professional orchestra playing at a dance in the Socialist headquarters in Detroit were arrested, along with a man eating dinner in the cooperative restaurant there.¹⁰³ Many of the people arrested were attending classes in English or other non-political subjects. The Justice Department agents made no effort at the time of the arrests to ascertain what was being said by speakers in the various clubrooms, what motions were being discussed, etc. All rooms were searched, literature carted away, typewriters and furniture smashed and ruined. No munitions or firearms were found.¹⁰⁴ None of the literature seized was later introduced as evidence against individual deportees and none of the deportees were ever implicated in the bomb plots, which remained unsolved.¹⁰⁵

A minority of the arrests were made individually, at the homes of the deportees. In no instance were these people arrested while in the course of illegal conduct.

2. 1930-1937:

Some arrests in this period were made by means of small raids of meeting halls. The majority were made individually, although they were usually made in the course of mass arrests of citizens and non-citizens demonstrating on issues unrelated to citizenship status. Demonstrations were held involving both citizens and non-citizens demanding more relief, higher wages, unemployment insurance, etc. Arrests were made at the demonstrations and the arrested persons taken to police headquarters. The citizens were frequently released

99. Post, op. cit., 34-46.

100. *Colyer v. Skeffington*, 265 F. 17, 50 (1920); *Ginger*, op. cit. 394-5 (1949).

101. Post, op. cit., 51.

102. Ibid., 56-7.

103. Ibid., 138.

104. Ibid., 33; Report on Illegal Practice 16-21.

105. Post, op. cit., 33, 305.

or charged with violating city ordinances,¹⁰⁶ disturbing the peace, etc. The non-citizens were then questioned by Immigration agents and some were arrested for deportation.¹⁰⁷ (Supra, p. 98.)

TABLE 3

CIRCUMSTANCES OF ARRESTS IN 53 POLITICAL DEPORTATION CASES: 1930-1937

Arrested during strikes or union organizing drives, inc. 3 during W. Coast longshore and seamen's strike, 1934	12
Arrested during demonstrations or organization of unemployed, inc. Washington Bonus March, 1932	6
Arrested in anti-Nazi and anti-Fascist demonstrations	3
Arrested in mass protest demonstration of Intl. Labor Defense	1
Arrested in raids on Communist Party headquarters ¹⁰⁸	4
Arrested in connection with Communist Party activity	11
Arrested after making voluntary statement of past membership in Communist Party to Naturalization inspector	1
Arrested after renting space to anarchist publication	2
Total known	40
Total not known	13
Total studied ¹⁰⁹	53

106. Anti-leaflet ordinances, speaking without a permit, etc.

107. Ohm was arrested by New York City police in 1934 while participating, along with others, in a mass protest demonstration sponsored by the International Labor Defense. After his arrest he was questioned by the city police concerning his alienage and membership in the Communist Party and was then turned over to Immigration officials. (*U. S. ex rel. Ohm v. Perkins*, 79 F. 2d 533 (2d Cir. 1935).) Anderson was arrested during a Communist demonstration on the streets of San Francisco and similarly questioned and turned over to the Immigration Bureau. (*Anderson v. U. S.*, 44 F. 2d 953 (9th Cir. 1930).)

At the height of the longshoremen's strike in San Francisco in 1934 (which became a general strike), Secretary of Labor Frances Perkins, replying to Governor Merriam, telegraphed her willingness to cooperate with state officials to rid the state of alien radicals. In fact several persons were arrested for deportation at that time and it is out of these circumstances that the *Harry Bridges* deportation case began. (See note 14.) III I. J. A. Bull. 2, p. 8 (1934).

108. One of the four was the janitor at the Communist Party headquarters, who was arrested when Labor Department agents were looking for someone else. (*Tom Andanoff*).

109. Figures are available concerning the circumstances of 77 political deportation arrests between March and September, 1933 (in addition to the 53 cases studied):

- 9 arrested during strikes and picketing by unions
- 55 arrested in raids on meetings, halls, etc.
- 1 arrested at New York City meeting on Scottsboro case
- 4 arrested in connection with Ford Hunger March and demonstrations at relief stations
- 2 arrested for membership in T.U.U.L. unions (see note 136)

3. 1944-1952:

During the second World War, arrests for deportation on political grounds virtually ceased,¹¹⁰ but they began soon after V-J Day and have continued to the present. These arrests occurred against an international and internal background not unlike that at the time of the Palmer Raids. But the character of the arrests was totally different in the two periods. Although the Immigration Service has publicized plans for arresting several thousand aliens for deportation on political grounds,¹¹¹ the actual arrests which took place from 1944 to 1952 probably did not exceed 375.¹¹²

In this period naturalized citizens and non-citizens were questioned about their own activities and the activities of friends and acquaintances in their nationality groups. A few persons became witnesses in deportation cases as a semi-permanent occupation.¹¹³ Meetings of fraternal groups were kept under surveillance, as well as meetings of committees to defend deportees.¹¹⁴ Arrests were made individually at the non-citizens' places of employment or at their homes. The people arrested were evidently selected for action some time before the arrests took place. This dis-

6 arrested for membership in Communist Party or participation in May Day celebrations.

Of this number 39 were released because they were citizens and 1 was released because insufficient evidence was produced at his deportation hearings. (II I. J. A. Bull. 4, p. 8 (1933).)

Other arrests for deportation in connection with strike activity occurred in Vermont and Rockland, Me. (Granite Workers Union); New York City (Commodore Hotel employees); El Monte, California (berry pickers); Paterson, N. J. (Food Workers Industrial Union). II I. J. A. Bull. 4, p. 8 (1933). In 1935 Frank Bellagatta was arrested without a warrant when he went to call upon a friend held at Ellis Island. III I. J. A. Bull. 10, p. 5 (1935).

110. See Appendix D.

111. See, e.g., statement of Attorney General Herbert Brownell Jr. to Society of the Friendly Sons of St. Patrick that 12,000 alien radicals are being investigated as a prelude to deportation proceedings, and 10,000 naturalized citizens are being investigated preparatory to denaturalization and deportation proceedings. (Boston Daily Globe, March 18, 1953). But compare NYTimes story of April 27, 1953 that "Deportation Drive Now Focused on 38", "Racketeer and Red 'Big Shots' Head List as Brownell Spurs Action of Predecessor".

112. See note 58.

113. E.g., John Leech was a witness in the first *Bridges* case. Dean Landis characterized him at length (Findings and Conclusions of the Trial Examiner 42, 43, 75-6, 41, 47) as one whose word under oath was not believable. Since that time (1939) he has testified in the following deportation hearings, among others: *Carlisle, Cryan, Lukman, Sassieff, Kohler, and Sterenson* (all in Appendix C). (Information from attorneys for deportees.) Charles Baxter has also testified in innumerable deportation hearings and became an advisor on Communist affairs to the Service office in Cleveland. Among the cases in which he appeared as a government witness: *Lukas, Schlossberg, Ganley, Jaffa, Callow, Rogash, Jones, Saltzman, Gottesman* (all in Appendix C). For other examples of government witnesses, see King and Ginger, *The McCarran Act and the Immigration Laws*, XI Law. Guild Rev. 128, 136 (1951), and controversy concerning credibility of government witness Paul Crouch, NYTimes July 9, 1954.

tinguishes this period from the other two. And it permitted the Justice Department to decide in advance the circumstances under which the arrests were to be made. None of the deportees in this period were arrested while engaged in illegal activity, and only a handful were arrested while engaged in political activity of any kind.

TABLE 4

ARRESTS BY YEARS IN 219 POLITICAL DEPORTATION CASES: 1944-1952

1944.....	4
1945.....	1
1946.....	9
1947.....	16
1948.....	45
1949.....	50
1950.....	26 plus 48 re-arrests ¹¹⁵
1951.....	43 plus 39 re-arrests

Years of arrest not known	194 plus 87 re-arrests
	25

Total cases studied	219
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The majority of the deportees were arrested years after they had admittedly ceased political activity (see Tables 7 and 8, *infra*), and in only a handful of cases did the Immigration Service indicate any specific actions of the deportees which led to their arrests (or rearrests).¹¹⁶

B. The dates and character of political activity of political deportees.

1. 1919-1920:

Louis F. Post, Assistant Secretary of Labor from 1913 to 1921, was given the job of deciding the bulk of the cases arising from the Palmer Raids. He reviewed the facts presented at the deportation hearings in order to determine the extent to which the deportees had sought to overthrow the U. S. Government by

force and violence, under the 1918 Act. He began this assignment on March 5, 1920. By June 30, 1920, he had decided between 3,700 and 4,000 cases.¹¹⁷ Under previous decisions by the Secretary of Labor, Post automatically ordered deported all who were members of the Communist Party at the time of their arrest and knew that they were members of that party.¹¹⁸ In nearly every case in which he ordered deportation "the record disclosed nothing but some variety of proof of mere technical membership in one or another organization which the Secretary of Labor had held to be within the proscription of the alien deportation laws. And in most of those cases it was apparent that the alien had neither suspicion nor cause for suspicion that the organization was unlawful".¹¹⁹ Of the 500 to 700 whom he ordered deported, at most "forty or fifty * * * were shown, either by confession or proof to have been advocates of or believers in violent methods of governmental change".¹²⁰ Concerning deportation for affiliation rather than personal belief, he said, "Except for the membership clauses of the deportation laws there could hardly have been, out of the thousands of aliens charged with deportable offenses, more than a canoe load of deportees".¹²¹

Post chose the case of Thomas Truss as typical of those in which he cancelled the warrant of arrest. "In the record of his hearing there was no evidence of any unlawful conduct, declaration or opinion, except membership in the Communist Party. His deportation hinged, therefore, solely upon the question of membership. * * * Mr. Truss had authorized a Communist Party organizer to sign an application for membership in his behalf. But this occurred several weeks before the Communist Party adopted the manifesto which outlawed its alien members. The organization itself did not exist. * * * The alien's understanding at the time of authorizing his application for membership * * * was * * * that he was about to join an organization for socializing mines, railroads, etc., and thereby lowering prices as the Government postoffice had lowered postage. Following his application for membership in the prospective Communist Party, Truss associated friends with him in the city of his residence to form a branch of the still non-existent Communist Party. Upon the actual organization of that party, this inchoate branch received a charter from it. But the branch postponed acceptance of the charter pending receipt of a copy of the constitution of the main body

114. In his decision in *Colyer v. Skeffington* (265 F. 17, at 26), Judge Anderson quoted from 3 May's, *Constitutional History of England* (Am. ed., vol. 2) as follows: "Next in importance to personal freedom is immunity from suspicions, and jealous observation. Men may be without restraints upon their liberty; they may pass to and fro at pleasure; but if their steps are tracked by spies and informers, their words noted down for crimination, their associates watched as conspirators, who shall say that they are free? Nothing is more revolting to Englishmen than the espionage which forms part of the administrative system of continental despotism. It haunts men like an evil genius, chills their gaiety, restrains their wit, casts a shadow over their friendships, and blights their domestic hearth. The freedom of a country may be measured by its immunity from this baleful agency. Rulers who distrust their own people must govern in a spirit of absolutism, and suspected subjects will be ever sensible of their bondage."

115. Discussed *infra*, pp. 120-21.

116. See King and Ginger, *op. cit.*, XI Law. Guild Rev. 131-2, notes 32, 34 and 35.

117. Post, *op. cit.*, 187.

118. *Ibid.*, 179-82.

119. *Ibid.*, 201.

120. *Ibid.*, 252.

121. *Ibid.*, 311.

or the appearance of an organizer to explain the purpose and methods of the organization. As neither constitution nor organizer came, the branch dissolved and returned the charter—all in complete ignorance of the unlawful declarations of the general organization".¹²²

Judge Anderson's conclusions, from the testimony he heard in the *Colyer* case, were very similar to Post's. " * * * from 800 to 1,200 people were arrested in New England and several hundred afterwards incarcerated on Deer Island in Boston Harbor. The charge was that the persons thus lawlessly seized were engaged in a Red or Communistic plot to overthrow our form of government. After most of them were, for utter lack of evidence, discharged, habeas corpus proceedings were brought in this court in behalf of 20, most of whom had been held subject to deportation. In all but 4 of the cases tried it was found by this court that the proceedings lacked due process of law".¹²³ In these four cases the Judge found that the deportees were consciously members of the Communist Party and understood its principles. He characterized three as "harmless English Socialists" and the fourth, Lew Bender, as a "Russian, difficult to understand".¹²⁴ In the cases in which Judge Anderson released the deportees he found that the majority had fled Czarist Russia and were working in this country at wages inconceivable to them before their arrival. He could not credit the Government's claim that they wanted to overthrow the system which was increasing their standards of living so markedly,¹²⁵ nor could he believe that they understood English well enough to comprehend the language used in the constitution of the Communist Party or other documents introduced by the Government.¹²⁶ It was his conclusion that the Communist Party itself did not seek the overthrow of the U. S. Government by illegal means within the definition of the 1918 Act;¹²⁷ he was reversed on this by the Circuit Court.¹²⁸

In at least one case the Immigration Bureau recognized that the alien was not dangerous to the community. Daniel Rakics applied for a writ of habeas corpus to test the order of deportation against him. The Circuit Court of Appeals in New York affirmed the order¹²⁹ because "some" evidence had been presented by the Government bringing him within the

statute. Later the Labor Department cancelled the warrant of arrest.¹³⁰

TABLE 5
CHARACTER OF PROSCRIBED POLITICAL ACTIVITIES OF
1,159 ALIENS ORDERED DEPORTED: 1919-1920¹³¹

	Number	Percent
Ordered deported on basis of personal belief in anarchy.....	83	7.
Ordered deported for present membership in Communist Party	530	45.
Ordered deported for membership in Russ. Workers Fed'n.....	246	21.
Total ordered deported.....	859	73.
Deportation warrants finally cancelled because based on membership in Communist Labor Party	300	26
Total for whom facts available among those ordered deported at some stage in the proceedings	1,159	100.

2. 1930-1937:

Of the forty-four political deportees in this period for whom facts were available, over half were charged with present membership in the Communist Party and 84% were charged with current membership, affiliation or belief in proscribed organizations or doctrines. 9% were charged with past membership. These figures must, of course, be read in the light of the status and activities of that party in the 1930s. As Dean James M. Landis ruled in the 1939 *Bridges* case:

" * * * it is a question of fact whether the Communist Party of the United States of America as of a particular time falls within the statutory ban of advising, advocating, or teaching the overthrow by force and violence of the Government of the United States. * * * That many decisions of Federal courts have sustained previous findings of the Department of Labor that the Communist Party * * * is within that ban, though persuasive, especially when based upon essentially similar evidence, is not conclusive of the question at the present time (citing cases). Not only is there the possibility that the characteristics and objectives of the Communist Party * * * have changed, but it is possible, in the light of changing economic and political conditions, to view the type of radical advocacy indulged in by that party as now so indefinitely related to force

122. *Ibid.*, 205-6.

123. *Petition of Brooks*, 5 F. 2d 238, 239 (1925).

124. *Ibid.*, 239 and *Colyer v. Skeffington*, 265 F. 17, 69-70.

125. *Colyer v. Skeffington*, at 50-1.

126. *Ibid.*, 71.

127. *Ibid.*, 58-61.

128. *Skeffington v. Katzeff*, 277 F. 129 (1st Cir. 1922).

129. *U. S. ex rel. Rakics v. Uhl*, 266 F. 646 (1920).

130. VI I. J. A. Bull. 101 (1938).

131. See note 64.

or violence as to cast doubt upon its appropriate inclusion within the ban of the statute. * * *. Constant re-examination of the theses and aims of such radical organizations is thus under the statute the responsibility of the Secretary of Labor."¹³²

Landis decided that to be "energetically radical"¹³³ and to support many changes in the economic and social systems of this country did not bring an alien within the ban of the 1918 Act. He did not decide whether membership in the Communist Party was adequate grounds for deportation, and the Supreme Court didn't reach this question in the *Strecker* case,¹³⁴ although the lower courts had split on the issue.¹³⁵

TABLE 6

CHARACTER OF PROSCRIBED POLITICAL ACTIVITY OF 53
DEPORTEES (AS CHARGED BY THE GOVERNMENT):
1930-1937

Character and dates	No.	%
Present membership in Communist Party	25	57.
Present affiliation with Communist Party	6	14.
Present membership in T.U.U.L. unions ¹³⁶	3	7.
Present anarchist beliefs and/or membership in anarchist group	2	4.
Past membership in Communist Party including 1 expelled	4	9.
Personal belief in violent overthrow	1	2.
Illegal entry into the U. S.	1	2.
Conviction of two crimes involving moral turpitude	2	4.
Total known	44	100.
Total not known	9	
Total studied	53	

Table 3, above, setting forth the circumstances of the arrests of the fifty-three deportees studied, gives

¹³². Landis, op. cit. 6-7. For Supreme Court decisions at this time on the "characteristics and objectives" of the Communist Party, see *Herndon v. Lowry*, 301 U. S. 242 (1937) and *DeJonge v. Oregon*, 299 U. S. 353 (1937).

¹³³. Landis, op. cit. 133.

¹³⁴. *Kessler v. Strecker*, 307 U. S. 22 (1939).

¹³⁵. *Strecker v. Kessler*, 90 F. 2d 1021 (8th Cir. 1937), 95 F. 2d 976 (5th Cir. 1938).

¹³⁶. Trade Union Unity League. In *Murdoch v. Clark*, 53 F. 2d 155 (1st Cir. 1931), the deportation order was affirmed for membership in the T.U.U.L. with the comment by the court that the deportee had been engaged for several years "in organizing mass groups of labor in opposition to the American Federation of Labor, and in conducting or advising in labor strikes." In 1934, upon the advice of the then Solicitor of the Labor Department, (now Judge) Charles E. Wyzanski, Jr., the Department changed its policy concerning membership in the T.U.U.L. and ruled that it was not a ground for deportation. (Landis, op. cit. 7, note 19).

independent proof that the majority were currently engaged in political or trade union activity. Thirty-seven out of forty for whom facts are available were involved in strikes or demonstrations.

Three of the deportees had been arrested under the state criminal syndicalism statute in 1922 after the Communist Party national convention in Michigan. They were never tried and in 1934, when the state charges were dropped, deportation warrants were also cancelled. The fourth deportee charged with past membership was arrested after publicity concerning his expulsion from the party. One non-citizen was arrested for deportation while awaiting trial on a criminal case arising out of a strike; his deportation warrant was later cancelled. Another was arrested for deportation after serving a short sentence for violence at a city council meeting discussing unemployment problems. A father and son were arrested for deportation after the father became a witness to an assault which occurred at a 1936 Communist Party election rally. One deportee was arrested for criminal syndicalism after he had been ordered deported, and another was arrested for deportation after he had been acquitted in a criminal syndicalism case.¹³⁷

Undoubtedly the majority of political deportees of this period were "energetically radical" at the time of their arrests, and participated in many of the current protest movements. But while several freely admitted membership in the Communist Party, this admission alone did not bring them within the 1918 Act, since several courts at this time refused to take judicial notice of the character of the Communist Party,¹³⁸ nor was membership proscribed by statute.¹³⁹ In at least nine cases which went to the courts the deportees had testified at length concerning their political beliefs and activities at their deportation hearings, and in at least three other cases the government had presented evidence of the personal beliefs of the deportees.¹⁴⁰ In the majority of Communist Party membership cases the government relied on proof of the character of that party and not on proof of the personal advocacy of force or violence by the individual deportees.

¹³⁷. Names of non-citizens given in the order in which their cases are mentioned: *Bacr*, *Popoff*, *Bail-Szak-Tallentire*, *Newman*, *Scovio*, *Panagopolous*, *Warnick*. (Citations in Appendix B.)

¹³⁸. E.g., *Ex parte Fierstein*, 41 F. 2d 53 (9th Cir. 1930).

¹³⁹. See note 21.

¹⁴⁰. In *U. S. ex rel. Ohm v. Perkins* (79 F. 2d 333, 2d Cir. 1935), the policeman who examined Ohm immediately after his arrest testified at the deportation hearing that Ohm had admitted Communist Party membership to him. In *U. S. ex rel. Fernando v. Commrs.* (65 F. 2d 593, 2d Cir. 1933), the court ruled that it was competent for the hearing officer to receive hearsay testimony concerning the political beliefs and affiliations of the deportee.

3. 1944-1952:

In 1941 the United States Supreme Court applied First Amendment guarantees equally to non-citizens and citizens.¹⁴¹ The charges against political deportees since that date provide an interesting test of the application of this rule.

Until the first indictments of Communist Party leaders under the Smith Act¹⁴² in 1948, no citizens were punished solely for being active Communist Party members. To date, no citizens have been punished for past membership in that party. In Smith Act cases the courts do not take judicial notice of the character of that party, and the individual defendants must be shown to be connected with illegal activities of that party.¹⁴³ To date, no members of that party have been tried for mere membership; only leaders of the party have been arrested.¹⁴⁴ While it is true that the Supreme Court ruled in 1951 that certain activities of the twelve leaders of the party between 1945 and 1948 were not protected by the First Amendment,¹⁴⁵ it is equally clear that non-citizens had no foreknowledge of this decision. The 1943 Supreme Court ruling in the *Schneiderman* denaturalization case¹⁴⁶ had been widely publicized among foreign-born Americans and had not prepared them for the *Dennis* decision. It wasn't until May, 1954 that the Supreme Court upheld the constitutionality of the provisions of the 1950 McCarran Act making membership in the Communist Party grounds for deportation, without regard to the dates of such membership or the degree of activity of the individual, and without the necessity of proving the illegal character of that party at the time of membership.¹⁴⁷

Facts concerning the charges against the deportees were available in one-third of the cases studied, including all of the cases of well-known Communists charged with current membership.¹⁴⁸

141. *Bridges v. California*, 314 U. S. 252 (1941).

142. *Dennis v. U. S.*, 341 U. S. 494 (1951).

143. See directed verdicts of not guilty as to defendants Simon Gerson and Isadore Begun in Smith Act trial of *U. S. v. Flynn, et al.* before Judge Dimock (S. D. N. Y. spring, 1953).

144. The twelve Communist Party leaders (*Dennis, et al.*) were also indicted for membership in the party, but have not yet been tried on that count. Lightfoot was indicted solely for membership in that party, spring 1954, in Chicago.

145. *Dennis v. U. S.*, 341 U. S. 494 (1951).

146. *Schneiderman v. U. S.*, 320 U. S. 118 (1943). But cf. Justice Jackson's discussion in *Harisiades v. Shaughnessy*, 342 U. S. 580, 593-4 (1952).

147. *Galvan v. Press*, 74 S. Ct. 737. In his dissent, Justice Black described the situation as follows: "For joining a lawful political group years ago—an act which he had no possible reason to believe would subject him to the slightest penalty—petitioner now" * * * faces deportation. (74 S. Ct. 737, 744).

148. The facts for Table 7 were taken mainly from court opinions reviewing denials of bail by the Service at the time of arrests and re-arrests of deportees. Assuming that the more

TABLE 7

CHARACTER OF PROSCRIBED POLITICAL ACTIVITY OF DEPORTEES (AS CHARGED BY THE GOVERNMENT): 1944-1952

Character and dates	No.	%
Present membership in Communist Party	15	19.
Present affiliation with Communist Party	1 *	1.*
Present membership in I.W.O. ¹⁴⁹	4 *	5.*
Government failed to prove Communist Party membership	2	2.5
Alien denied charge; dates of Government allegation not known	2	2.5
Past membership in Communist Party in another country, before entry into U. S.	5 *	6.*
Past membership in U. S. Communist Party	51	64.
Total known	80	100.

* These figures are accurate for the entire group of 219 cases.

President Truman's Commission recommended that proceedings for deportation not brought within ten years of the proscribed activity should be barred.¹⁵⁰ If this recommendation were adopted, thirty-five of the fifty-one persons charged solely with past membership in the Communist Party would be released from deportation warrants. If the prohibition against ex

"active" deportees were re-arrested and denied bail. (see instructions re October 1950 arrests mentioned in note 250 infra), these figures would probably be over-weighted in terms of charges of present membership in the Communist Party.

149. International Workers Order. To date no criminal penalties have attached to citizens who joined the I.W.O., a fraternal insurance organization. In 1943 the Commissioner of Immigration, Earl G. Harrison, in a letter to American Committee for Protection of Foreign Born, stated that I.W.O. membership was not a basis for denial of naturalization. (*The Lamp*, Feb. 1946, p. 3). In a 1945 case, the Service recommended that citizenship be granted to Anthony Goncharevich but at the same time submitted data from the files of the Dies UnAmerican Activities Committee concerning the I.W.O. of which Goncharevich had been a member. (*The Lamp*, Feb. 1946, p. 3). The 1st Circuit Court of Appeals declined to take judicial notice of the character of the I.W.O. on the basis of the Dies Committee material in *Stasiukerich v. Nicolls*, 168 F. 2d 474 (1948). For current status of I.W.O., see *I.W.O. v. McGrath (Joint Anti-Fascist Refugee Comm. v. McGrath)*, 341 U. S. 123 (1951), and charges of Department of Justice heard before Subversive Activities Control Board under McCarran Internal Security Act of 1950, sec. 7. But cf. decision of Board of Immigration Appeals granting suspension of deportation to *Clara Dainoff*, a long-time but inactive member of I.W.O. (A 5-059-353, Dec. 11, 1951). In the case of *Andrew Dmytryshyn*, Dec. Aug. 19, 1953, the B.I.A. sustained the finding of fact by the hearing officer that the I.W.O. was an affiliate of the Communist Party, but ordered deportation proceedings terminated because alien established that he was not aware of such affiliation. Re-argued Sept. 16, 1953; no decision by June, 1954. Similar decisions were reached recently in the cases of *Maurizio Cardosi* and *Joseph Schiffel*. (Information from counsel for deportees.)

150. President's Commission Report 265. The Report discusses the problem of former Communist Party members who no longer believe in Communist doctrines and makes some proposals for amending the section of the Walter-McCarran Act covering this point, 226-28.

post facto legislation applied to deportation proceedings, 82% of this group would not be deportable because their membership ceased before passage of the 1940 Act making past membership grounds for deportation.¹⁵¹

TABLE 8

DATES OF PAST COMMUNIST PARTY MEMBERSHIP OF
51 DEPORTEES: 1944-1952

	Cumulative	
	No.	%
Dates of past membership not known	3	6.
Membership ended before 1925	1	2.
before 1930	4	8.
before 1935	15	29.
before 1940	42	82.
before 1946	48	100.
Total known	51	

In only one of the 219 cases studied did the Service seek to prove that the individual deportee personally believed in and advocated the overthrow of the government by force and violence. Peter Harisiades, an official of the Communist Party for a decade, was dropped from membership in 1939 when the party limited membership to citizens. In his deportation hearings he admitted his prior membership, said that he still believed in Marxism, and testified at length concerning his beliefs. Since both sides considered this a test case, the government conducted a vigorous cross-examination of Harisiades and his main witness, naturalized-citizen William Schneiderman. The Board of Immigration Appeals held¹⁵² that no personal belief in or advocacy of violent overthrow had been shown.

In addition to their political activity, the majority of the deportees in this period were past or present members of trade unions and/or fraternal organizations. Many had been officers of such organizations, and at the time of their arrests twenty-one were officers of local or international unions, twelve were officers of fraternal organizations and twelve were editors or reporters with foreign-language newspapers.

Eleven of the deportees had fought in the Loyalist army in the Spanish Civil War a decade before their arrests. Several of the 219 political deportees had been involved in strikes and union organizing campaigns in the 1930s. At least two were arrested at that time in anti-Nazi demonstrations, and one for

picketing a relief station in 1935. None had been convicted of a felony in a political case prior to his arrest for deportation; although nine have since been convicted of violating the "conspiracy to advocate" section of the Smith Act. In the great majority of the cases the government made no claim that the deportee was currently engaged in proscribed political activity; it presented evidence of former membership in the Communist Party and nothing further.

C. Other pertinent information on the likelihood and ability of political deportees to attempt to overthrow the U. S. Government by force and violence.

None of the political deportees in the three periods studied took any active steps looking toward the overthrow of the government.¹⁵³ Some of them made comments (in writings, speeches, or testimony to Immigration officials) indicating that the form of government should be changed and that force might/would be involved in this change. Using the terms made familiar by current Smith Act indictments, the arrests were based on membership in or participation in a "conspiracy to advocate" violent overthrow.

One test of the criminal tendencies of the deportees is their criminal records prior to deportation arrests:

Extent of non-political criminal records of political deportees:

- 1. 1919-1920:** No information available on this point.
- 2. 1930-1937:** One of the fifty-three deportees studied had served two sentences for forgery of checks fourteen years before his deportation arrest. He had gotten into no difficulties since, had married a citizen and become the father of three children. Another had been convicted of aiding and advising another non-citizen to make false statements in applying for citizenship. (His deportation was cancelled when he was granted a pardon.)¹⁵⁴
- 3. 1944-1952:** Eleven of the 219 deportees in this period were charged with criminal violations of the deportation laws at some time prior to 1953¹⁵⁵ (making false statements on naturalization applications,

153. The anarchist *Alexander Berkman*, arrested during the first period and deported on the *Buford* Dec. 1919, had been sentenced to a long prison term for the attempted assassination of industrialist Henry Clay Frick in connection with the Homestead strike of 1892.

154. *Walter Baer* and *Chris Popoff*, in that order. (Citations in Appendix B.)

155. *David Balint*, *Doyle*, *Karasek*, *Minasian*, *Obermeier*, *Spector*, *Tandarie*, *Torres*, *Vallon*, *Joe Weber*, *Weiner*. (Citations in Appendix C.)

151. 54 Stat. 673, 8 U. S. C. 137.

152. File A 5-300-756, decided May 13, 1949. For another case in which the Service sought to prove personal belief, see *Hearings and Conclusions of Trial Examiner Landis* in the first *Harry Bridges* case, 133 (1939) and later decision by the Supreme Court on this question (arising out of second *Bridges* hearings), *Bridges v. Wixon*, 326 U. S. 135 (1945).

failing to deport themselves under 1952 Act, sec. 242e, etc.) At least one of the non-citizens was convicted of a non-political felony (robbery) as a youth of 18, but has been in no difficulties in the intervening 25 years.¹⁵⁶ No other non-political convictions are known; the great majority of the 219 were arrested for the first time in their lives when served with warrants for deportation.

Age and sex of political deportees at time of arrest: Some slight indication of the ability of the deportees to act in a forceful or violent way can be seen from their ages when arrested, and their sex. (Neither factor would seriously affect their ability to advocate such change by speech, publication or assembly.)

1. 1919-1920: No information. The majority arrested were men, but some women were also detained.

2. 1930-1937: 51 men and 2 women comprised the 53 cases studied. The ages of only 12 are known: the youngest was 17; 10 were between 20 and 45; 1 was over 45. These figures are in no way conclusive, but, in conjunction with other facts (extent of participation in demonstrations, strikes, etc.) seem to indicate that many of the group, if not the majority, were relatively young and active when arrested.

3. 1944-1952: 185 men and 34 women were studied in this period.

TABLE 9

AGES OF 219 POLITICAL DEPORTEES AS OF
JANUARY, 1952: 1944-1952¹⁵⁷

	Cumulative	
	No.	%
Over 65 years	10	5.
Over 56 years	66	34.
Over 46 years	157	80.
Over 36 years	194	98.
Over 25 years	197	100.
Facts not known.....	22	
Total studied	219	

Eight deportees died while their cases were pending, and two died soon after being deported. At least 2 required hospital treatment while being detained at Ellis Island.¹⁵⁸

^{156.} Joe Lukas. (Citation in Appendix C).

^{157.} Or date of conclusion of case.

^{158.} Died while cases pending: Alex Balint, Garcia, Misir, Paivio, Zallas, Weiner, C. Kratochvil, Rothstein; died after being deported: Cruz and Martinez (note 177); Milgrom sent from Ellis Island to Mt. Sinai Hospital, winter 1952-3; Yaris sent to Bellevue Hospital from Ellis Island, spring 1953. (Citations in Appendix C).

Participation in U. S. Armed Forces: Some inferences as to the likelihood of political deportees seeking to overthrow our government may perhaps be drawn from their attitude toward participation in our Armed Forces.

1. 1919-1920: No information.

2. 1930-1937: No information.

3. 1944-1952: 4 of this group are veterans of the first World War, 5 are veterans of the second World War, and one, a Korean, served with the O.S.S. during World War II. 24 of the group have sons who fought in World War II or are currently in the Armed Services. None of this group rejected military service.

It is admitted that limited data has been presented concerning the political beliefs and activities of the deportees studied. But when dealing with the 1918 Act, which prescribes deportation for political beliefs, associations, memberships and activities, it is not easy to know what data is significant and what is definitely superfluous. Nor is it easy to obtain the kinds of data which are clearly significant. However, sufficient evidence has been presented to indicate that the arrests cannot be correlated with the dates of the past proscribed activities of the persons arrested, or the likelihood of their participating in illegal activities in the future.

In the 1919-1920 period, the arrests were reportedly made in order to forestall future bomb plots against government officials. In fact the specific dates of the mass arrests were set arbitrarily by the Departments of Justice and Labor, some of whose agents arranged that meetings of objectionable organizations be held on those dates, to facilitate the making of arrests.¹⁵⁹ The persons arrested were not taken while engaged in illegal activities and deportation hearings showed that the overwhelming majority had never been engaged in such activity at any time. Due to the work of the Justice agents within several of the proscribed organizations, the Labor Department could have been made aware of the names and non-citizen status of many of those arrested long prior to the mass arrests.

In the second period, 1930-1937, the deportees were arrested while engaged in activities which the Labor Department deemed objectionable (whether or not citizens engaged in similar activities could have been punished therefor). They were in effect arrested for deportation as a result of actions which were not themselves deportable offenses. In this respect this period is unlike the other two periods studied.

^{159.} *Coyler v. Skeffington*, 265 F. 17, 67-8, 69 (1920); Post, op. cit., 82-3 (1923).

In the third period, 1944-1952, the discrepancy between the time and circumstance of the arrests and the dates and character of the deportees' proscribed activities is most marked. As in the 1919-1920 period, arrests apparently were made according to a schedule set up by the Justice Department, although the majority of the arrests were made singly or in small groups. But the government did not make clear why it arrested someone in this period for his activities one or two decades ago. In those two instances in which mass re-arrests took place (October 1950 and August 1951), the courts ruled that the deportees could remain at liberty because their activities prior to the re-arrests had been unexceptionable.

The question remains to be answered: if the majority of the arrests were not timed in relation to the objectionable activities of the persons arrested, what were the motives behind the arrests? The published state-

ments of the Immigration Service do not provide a satisfactory answer and their files are of course closed in this regard. A research writer speculating on the motives behind these thousands of political deportation arrests might study the political and economic situation of this country in the three periods studied, the anti-foreign-born attitude resulting therefrom, the lack of political power of these non-voting residents, and the degree of public acceptance of First Amendment concepts. The absence of a reasonable statute of limitations on political deportation arrests has given such factors much freer rein than they are permitted in other areas of the law. Only changed political and social philosophies can explain the arrests in the 1940's for activities or associations not illegal in 1920 or 1930 when committed. In order to test such speculations, it is necessary to discover the results of these arrests in terms of actual deportations from this country.

III. What proportion of the persons arrested for deportation on political grounds have actually been expelled from the U. S. in the periods studied?

TABLE 10

RESULTS OF ARRESTS FOR DEPORTATION ON POLITICAL GROUNDS: 1919-1920, 1930-1937, 1944-1952

	1919-1920		1930-1937		1944-1952*		Totals for 3 periods	
	No.	%	No.	%	No.	%	No.	%
Total arrests studied	5,000-6,000	100	53	100	219	100	5,272-6,272	100
Citizens arrested; released	1,500	30	0	0	0	0	1,500	28
Arrested on warrants (issued before or after arrests)	3,500-4,500	70	53	100	219	100	3,772-4,772	72
CASES IN WHICH WARRANTS ISSUED:								
Warrants cancelled after deportation hearings	2,200-3,000	62.8	10	19.	4	1.8	2,214-3,014	58.7
Warrants cancelled after court action	20	.5	5	9.	3	1.3	28	.7
Warrants cancelled because citizenship granted	0	0	0	0	2	.9	2	.05
Deportees died pending final determination of cases	2	.1	0	0	8	3.6	10	.25
Remained in U. S. after final order of deportation	6	.1	1	2.	0	0	7	.1
Actually deported in period studied	264-314	7.5-8.9	3	5.6	11	5.	278-328	7.3-9.1
Accepted voluntary departure in period studied ^a	0	0	6	11.	26	11.8	32	.7
Ordered deported but final outcome not known	595-666	11.-19.	18	33.	0	0	613-684	16.
Final administrative action not known	412	11.8	10	19.	26	11.8	448	11.9
Cases now pending	1	.1	0	0	139	63.5	140	3.7
TOTALS	3,500	100.	53	100.	219	100.	3,772	100.

Figures for 1919-1920 period found in sources cited in note 64; figures for other two periods from cases in Appendices B and C.

^a Voluntary departure is explained in note 166.

* Figures for 1944-1952 cases include events through June, 1954.

A. Results of political deportation arrests.**1. 1919-1920:**

Of the five to six thousand persons arrested for political deportation in this period, 30% were citizens and were therefore released immediately after the arrests. An additional 44% were non-citizens against whom the government was not able to prove its charges; following hearings the deportation warrants were cancelled. 34 of the arrests in this period, therefore, were improper, based on insufficient evidence. Of the 2,200 to 3,000 who were released after their hearings, many had been confined for several weeks or months.

Of the remaining 25%, only 264 to 314 were actually deported during this period.¹⁶⁰ But the majority of the persons ordered deported could not in fact be expelled from the country because they were born in Czarist Russia and could not be deported to the Soviet Union because the U. S. had no diplomatic relations with that government.¹⁶¹ These non-citizens remained in this country; some undoubtedly became citizens. There is no indication how many later were arrested on other grounds, if any. A study of their activities after 1920, political and otherwise, is suggestive. In 1925 Lew Bonder, the "inarticulate Russian" referred to by Judge Anderson in the *Colyer* case,¹⁶² came before him again. In the intervening 5 years "he has been working at his trade, learning English, and taking music lessons" and had engaged in no improper activities.¹⁶³ Another lived peacefully in New England from 1920, when he was ordered deported, until 1951, meanwhile having married, become a father, supported his family and kept out of difficulties with law enforcement agencies. In 1951 he was ordered to report to the Immigration Service for deportation to Soviet Russia, although deportation was equally impossible in the two periods.¹⁶⁴

2. 1930-1937:

All of the 53 persons studied in this period were non-citizens (unlike the first period), and 3 persons

(5.6%) are known to have been deported. It is probable that an additional 28 persons (53%) were actually deported, including 18 ordered deported but in which final outcome of the cases is not known, and 10 cases in which final administrative action is not known.¹⁶⁵ Five deportees, natives of Italy, Germany and Japan, fearing prison or other punishment if the deportation orders were carried out, accepted voluntary departure¹⁶⁶ to other countries. One deportee, ordered deported to Germany, fled to Mexico without permission of the Immigration Service.¹⁶⁷

Out of the 53 cases, the warrants of arrest were cancelled in 15 (28%), as follows:

TABLE 11

WARRANTS CANCELLED OUT OF 53 POLITICAL DEPORTATION CASES: 1930-1937

Warrants cancelled by Immigration Service:

after T.U.U.L. disaffiliated from proscribed international group	2
after Service ruled evidence presented at hearing insufficient	2
after state dropped criminal syndicalism charges	3
after deportee received pardon for crime involving moral turpitude	1
but Service gave no reason	1

10 (19%)

Warrants cancelled after court action:

after Circuit Courts of Appeals ruled evidence insufficient for dep. ¹⁶⁸	3
after U. S. Supreme Court ruled past membership in Communist Party not grounds for deportation under 1918 Act ¹⁶⁹	1
after U. S. Supreme Court granted certiorari on question of deportation for membership in T.U.U.L. union ¹⁷⁰	1

5 (9%)

Total warrants cancelled 15 (28%)

160. Immigration Service figures show 314 political deportations in 1920 and 446 in 1921. Arrests in political deportation cases continued after the Palmer Raids ended in Jan. 1920, and the average Raid case took no more than 4-6 months from arrest to decision by Post, and few cases were extended by appeals to the courts. For these reasons it seems likely that Post's figure of 264-314 actual deportations resulting from the Raids is fairly accurate. However, it is possible that some Raids, arrests ended in deportation late in 1920 or 1921. The total deportations for 1920 and 1921 were 760. Post counted 264-314. Therefore no more than 446-496 additional deportations could have taken place, assuming that all of the deportations in those years were of persons arrested in the Raids. If 446-496 cases ended in deportation out of the 596-666 cases in which the alien was ordered deported but final outcome was unknown to the writers the total deportations resulting from the Raid arrests were 760, or 21.7%.

161. See notes 180, 181, 207, 214.

162. *Colyer v. Skeffington*, 265 F. 17, 69-70.

163. *Petition of Brooks*, 5 F. 2d 238, 239 (1925).

164. *Peter Tkachuk*.

165. The large number of political deportees who were actually expelled in this period (244) and the relative ease with which deportations could be accomplished (compared with the first and third periods) lead to this conclusion.

166. Voluntary departure is a procedure under which an alien ordered deported is permitted to depart at his own expense to a country of his choice, rather than be deported at the expense of the government to a country chosen by the government. A person who has thus departed voluntarily may re-enter the country under certain conditions. (Sec. 244 of Immigration Act of 1952). See Wickersham Report 56-8 (1931).

167. Further discussion of voluntary departure and countries of origin, *infra*, Table 12 and note 206.

168. *U. S. ex rel. Ohm v. Perkins*, 79 F. 2d 533 (2d Cir. 1935).

169. *Kessler v. Strecker*, 307 U. S. 22 (1939).

170. *U. S. ex rel. Boric v. Marshall*, cert. granted 290 U. S. 623, petition withdrawn at 709 (1935); see note 136.

At least one of the 28 ordered deported is known to have remained in the U. S., married a citizen, become a parent of American-citizen children and attempted to adjust his status in 1949. Five persons whose deportation warrants were cancelled in this period were re-arrested for deportation in the third period.¹⁷¹

3. 1911-1952:

Like the second period, all persons arrested in this period were non-citizens. Of 219 cases studied, 11 had ended in actual deportation through June, 1954 (5%). An additional 26 deportees had accepted voluntary departure (11.8%).¹⁷² The total number of deportees who left the country was therefore 37 (16.8%). 139 cases (63.5%) are still pending for this period,¹⁷³ and in another 26 cases the final administrative action is not known (11.8%). It would therefore be mathematically possible for this 75.3% of the cases to end in deportation, in addition to the 16.8% who have already departed. But in fact, deportation cannot be effected in 40% of these cases, since 86⁷⁴ of the deportees were born in Russia or other Eastern European countries which will not accept deportees from the U. S.¹⁷⁵ Thus the total prospective deportations (35.3%) plus the deportations already effected (5%) plus the voluntary departures already effected (11.8%) equal 52.1% of the total cases. That is, 52.1% of the cases could end in expulsion or departure from this country, assuming that every deportee who claimed he would be subjected to physical persecution in his home country (10%)¹⁷⁶ lost his case or was deported to another country.

In the first two periods, no cases known to the writers ended in the granting of citizenship and the cancellation of deportation warrants therefor. In the third period, 2 deportees (.9% of the cases) became naturalized citizens; 8 deportation cases ended in the death of the deportee prior to final determination. Of the 11 persons deported, 2 died soon afterward.¹⁷⁷

171. *Boric, Fierstein, Schneider, Strecker, Petroskey.*

172. Discussed at length, *infra* pp. 115, 121.

173. Discussed *infra* pp. 121-2.

174. Table 13 *infra* shows 97 deportees born in Russia or Eastern Europe, but of this number 11 have already accepted voluntary departure.

175. Discussed *infra*, pp. 115-6.

176. Table 13 *infra* shows 26 deportees claimed physical persecution; but of this number 6 have already accepted voluntary departure.

177. *Refugio Martinez* (citation in Appendix C) suffered a cerebral hemorrhage in 1952. After the Supreme Court split 4-4 on his case, thus upholding the decision of the Court of Appeals (which contained error, as confessed by the Service), the Service ordered his immediate deportation to Mexico. He suffered an attack on the train trip from Chicago south, and died 9 days after leaving his home in Chicago for Mexico. (Information from Eugene Cotton, Esq., Chicago.) Cruz died soon after deportation; his widow was arrested for deportation thereafter. (*The Lamp*, May-June 1954.)

B. The indirect penalties inherent in the administration of the law.

The facts presented in Table 10 indicate that, in many cases, the arrests have not been a step in the process of quickly expelling persons from the United States. On the contrary, it seems probable that many of the arrests were used rather as a means of making an example of certain individuals in order to discourage all residents, particularly non-citizens and naturalized citizens, from behaving in ways unacceptable to the Immigration authorities and the Department of Justice.¹⁷⁸ The deportation laws seem often to have been administered with a view to imposing on deportees various penalties other than deportation, such as incarceration, the financial expense of lengthy litigation, continuous personal insecurity, loss of employment. This hypothesis is supported by a study of three further factors in the cases: the countries of origin of the deportees; their detention without bail and the amount of bail required pending conclusion of their cases; the length of the proceedings.

1. 1919-1920:

Countries of origin of political deportees:

The majority of the deportees in this period were nationals of Russia. At the time the raids were carried out, the Soviet Government had come into power, but the representative of the Kerensky government remained in Washington. He had no power to grant passports valid for use in Soviet Russia. However, it seems clear that the Immigration Bureau was in fact able to negotiate with the Soviet government since it arranged for the turning over of the 184 deportees aboard the *Buford* to that government under a flag of truce.¹⁷⁹ The Bureau evidently thought that it could continue to deport persons to Soviet Russia in 1920, as shown by the *Okolitenko* case¹⁸⁰ (although in fact they were mistaken in this belief),¹⁸¹ and the deportees who were natives of other countries could be deported without

178. Concerning "making an example" as a means of discouraging violations of the criminal law, see Holmes, Oliver Wendell, "The Common Law" 46-9 (38th printing, 1945).

179. *Post*, op. cit. 5-6.

180. *Okolitenko* was deported to Russia twice in 1921-2 and was sent back each time because his passport had been issued by the diplomatic representative of the defunct Kerensky government. After four Atlantic crossings he was released by the Immigration Bureau; habeas corpus proceedings had been initiated for the third time. (*U. S. ex rel. Okolitenko v. Commr.* (unrep.) (#M9-235, M 9-344, M 9-398, S. D. N. Y. 192-), see brief for appellant in Court of Appeals, *Chew v. Colding*, 16 (decision at 192 F. 2d 1009 (2d Cir. 1952)). The late Carol King, Esq., was of counsel in *Okolitenko* and *Chew* cases.

181. On the same problem, see *Petition of Brooks*, 5 F. 2d 238 (D. C. Mass. 1925), *Saksagansky v. Weedon*, 53 F. 2d 13 (9th Cir. 1931), *ex parte Matthews*, 277 F. 857 (W. D. Wash., N. D. 1921); *Post*, op. cit., 284; *Wickersham Report* 118-19 (1931).

difficulty. Therefore no significance can be attached to this factor in this period.

Detention without bail and amount of bail required:

The attitude of the arresting officials toward detention and bail was much more indicative of the government's reasons for making the arrests. The customary purpose of detention pending final determination of a case is to insure the presence of the defending party at all stages of the proceedings. Bail is customarily denied when it is felt that there is a likelihood that the party will not live up to the terms of a bail bond, i.e., will not appear when called to administrative hearings or court proceedings. Particularly in deportation proceedings, in which the defending party is not charged with violation of criminal law, any incarceration while the case is pending should not amount to punishment.

Yet, whether by design or monumental lack of forethought,¹⁸² thousands of political deportees were jammed into filthy rooms lacking in sanitary facilities,¹⁸³ denied reading matter or recreation, and, in Hartford, Conn., punished for minor infractions by being locked in "sweat boxes" until unconscious.¹⁸⁴ All attempts to communicate with family, friends, or counsel were futile in the first few days, and in some cases, deportees were held incommunicado for months.¹⁸⁵

Although Secretary of Labor Wilson had set \$1,000 as the amount of bail to be required in the average deportation case, including political cases,¹⁸⁶ the Justice Department held the deportees without bail,¹⁸⁷ and when they were turned over to the Labor Department, it regularly set bail at \$10,000.¹⁸⁸ For non-English

speaking prisoners it was difficult even to learn how much bail was required.¹⁸⁹ For them to notify their friends was also difficult. But when these problems were solved, the raising of \$10,000 bail was clearly impossible in most instances. It cannot be supposed that the Immigration authorities were surprised that thousands of the deportees were unable to satisfy this bail requirement. In those instances which reached the courts, reasonable bonds were promptly set and the deportees did not violate their terms.¹⁹⁰

Length of proceedings:

Since the administrative procedure (from arrest through interrogation, hearing and submission to Asst. Secretary of Labor Post for decision) required four to six months,¹⁹¹ the majority of deportees were incarcerated for this period, including, of course, those whose deportation warrants were eventually cancelled.

It is difficult, in the face of these facts, to believe that the sole purpose of the Palmer Raids was the expulsion of aliens who threatened violent overthrow of the government. The Raids seem also to have been meant as a warning to all non-citizens to eschew efforts to achieve social reform by group action. The methods used in effecting these arrests seem more proper to the latter purpose than to the former one.

In New York some of the persons arrested November 7, 1919, were blackjacked, hit with stair rails, beaten, shoved, given black eyes.¹⁹² December 21, 1919, with the greatest haste and secrecy, 184 of those arrested in this manner were deported on the SS *Buford* (described above, p. 100): "Notice of only a few hours

182. *Colyer v. Skeffington*, 265 F. 17, 45.

183. See graphic description of situation at Deer Island in *Colyer* case. Judge Anderson mentioned the confusion; "the atmosphere of lawless disregard of the rights and feelings of these aliens as human beings" which affected "consciously or unconsciously" the inspectors who held deportation hearings there; the alien who committed suicide on the Island, one who was committed as insane and others "driven nearly, if not quite, to the verge of insanity." He concluded with the organization of "The Soviet Republic of Deer Island" by the deportees, who were "found to be capable of organizing amongst themselves, with the consent of and in amicable cooperation with their captors, an effective and democratic form of local government" to handle the problems of sanitary facilities, distribution of mail, etc. (265 F. 17, 45).

184. Report on Illegal Practices 7-16, especially affidavit starting on p. 12.

185. *Ibid.*

186. Post, op. cit. 72.

187. *Ibid.* at 69, 76-7, 106.

188. *Ibid.*, 105, 190-1. Bail can be granted in a deportation case in one of two ways: (1) The Immigration Service can set the bail at the time of making the arrest and accept the money put up for administrative bail. (2) If the Service refuses to set bail or sets bail in an amount which the deportee feels is unreasonable, he can seek a writ of habeas corpus (usually in the court for the Federal District where he is held). The court can then rule that the Attorney General abused his discretion in denying bail or setting unreasonably high bail, and the court can grant court bail. However, it frequently

develops that the court states what bail should be set and agrees to issue the writ of habeas corpus unless the Service accepts administrative bail in that amount within 24 hours. If the Service wishes to appeal the granting of bail, it refuses to accept administrative bail and the court grants the writ and accepts court bail in the sum set. The courts have repeatedly rejected the contention of the Service that the Attorney General's exercise of his discretion in setting or denying bail is not subject to review by the courts. *U. S. ex rel. Macklem v. Commr.*, 268 U. S. 679 (1925), *U. S. ex rel. Vajtauer v. Commrs.* (no citation for granting of bail by Justice Stone, April 28, 1925; deportation case 273 U. S. 103 (1927)); the most recent judicial expression of this view is in Justice Douglas' opinion, *Yanish v. Barber*, 73 S. Ct. 1105, 1108 (decided May 16, 1953).

189. Post, op. cit. 105, 190-1.

190. *Ibid.*, 155; *Colyer v. Skeffington*, 265 F. 17, 21, 78. In *U. S. ex rel. Weinstein v. Uhl*, 266 F. 929 (1920), the Immigration officials set bail at \$10,000. At the deportation hearing the non-citizen refused to answer certain questions, on advice of counsel. The Bureau then refused to accept the \$10,000 offered for bail until ordered to do so by the District Court. See other cases cited in Appendix A.

191. Post claimed that "dilatatory attention [was] given to the cases in the Bureau of Immigration after the arrests had been made, and manifestly at the instigation of the Department of Justice with which the Bureau was at the time 'cooperating.'" (op. cit., 69, 158-9.)

192. *Ibid.*, 31-2, quoting from N. Y. Times, Nov. 8, 1919; Report on Illegal Practices 16.

TABLE 12

COUNTRIES OF ORIGIN OF 53 POLITICAL DEPORTEES:
1930-1937

	No.	%
Countries in which deportees claimed they would be subjected to physical persecution because of their political beliefs	22	56.
including		
Germany	7	
Italy	6	
Finland	5	
Poland	3	
Japan	1	
Country which refused to accept deportees for permanent residence during most of this period and to which deportees could not be sent		
Russia (now U.S.S.R.) ²⁰⁷	3	8.
Other countries of origin to which deportation could be completed	14	35.
	39	100.
Countries of origin not known	14	
Total	53	

but as visitors among us who had worn out their welcome." (Post, op. cit., 17-21.) See opinion of Judge Learned Hand in *U. S. ex rel. Gilotti v. Commr.*, 35 F. 2d 687 (2d Cir. 1929), in which the non-citizen was ordered deported to Italy despite his open anti-Fascist activity. This opinion was discussed in Wickersham Report in connection with refusal of Department of Labor to permit voluntary departure of Italian Communist *Guido Serio* to the Soviet Union, despite completion of all arrangements for his immediate departure there (120-23) (1931). In the winter of 1938, 19 men were detained at Ellis Island on their return to U. S. from fighting for the Loyalist Government in Spain. (I. J. A. Bull. Dec. 1938, p. 63.) Judge Bondy (S. D. N. Y.) dismissed petitions for writs of habeas corpus in two of these cases, but wrote on the back of each writ: "Under the unusual circumstances of this case the court suggests to the Secretary of Labor that she consider the advisability of permitting the subject to depart to a country where he may remain in safety." (Cases of *Stefanos Tsernegos* (Greece) and *Mirko Markovich* (Yugoslavia), N. Y. Times Nov. 26, 1938 (3:15).) *Anton Goepels*, German socialist, attempted to commit suicide when discovered as a stowaway on arriving in U. S., and required to surrender for deportation to Germany. Rep. Celler introduced a private bill in his behalf directing the Secretary of Labor to cancel the warrant of deportation against him. (I. J. A. Bull., Feb. 1938, p. 101.) H. R. 7640 was introduced in the 1937 session of Congress providing for the "right of political asylum" in such cases, but was not passed. In 1939 Judge Yankwich (D. C. Cal.) dismissed petitions for writs of habeas corpus by *Hans Kuth* and *Gunther Haberman*, active anti-Nazis in Germany before their entry into U. S., on the ground that they had no constitutional right to asylum here. (I. J. A. Bull., Aug. 1939, p. 11.) In *U. S. ex rel. Mueller v. Commr.*, 99 F. 2d 1019 (2d Cir. 1938), the court refused to reverse the order of deportation to Germany in the face of Mueller's membership in Communist Party in Germany and introduction by counsel of instructions issued by the German government concerning the treatment of Communists in the concentration camps. However, in *U. S. ex rel. Weinberg v. Schlotfeldt*, 26 F. Supp. 283 (Ill. 1938) the court took judicial notice of the plight of Jews in Czechoslovakia at that time and granted the writ prayed for. And see Oppenheimer, Recent Developments in the Deportation Process, 36 Mich. L. Rev. 355, 376 (1938).

207. In two cases in the 9th Circuit the courts affirmed the dismissal of habeas corpus writs by the District Courts but ruled that the deportees must be released within 30 days or so if deportation to the Soviet Union could not be effected.

The 22 cases mentioned above take on further significance because it was public knowledge that several of the deportees were arrested while participating in demonstrations against Nazism and Fascism at the German and Italian consulates.

Detention without bail and amount of bail required:

In this period these were not significant factors, since most deportees were promptly released on reasonable bail.²⁰⁸

Length of proceedings:

No facts are available on this point for this period. Since most of the deportees were free on bail pending final decision in their cases and were not threatened with re-arrest or difficult parole conditions during the proceedings, the length of the proceedings was not as significant as it became in the third period.

If the Immigration authorities were interested in pointing up a lesson by means of these 53 arrests during the depression years, it was that non-citizens who protested against other governments or marched on picketlines or demanded additional relief or spoke vociferously at city council meetings or attended Communist Party affairs might be arrested for deportation.

3. 1944-1952:

Countries of origin of political deportees:

Two of the points mentioned in relation to the earlier periods continued to complicate deportation in the third period:

a) In 1950 the McCarran Internal Security Act prohibited the expulsion of a person to "any country in which the Attorney General shall find that such alien would be subjected to physical persecution."²⁰⁹ This salutary provision, however, did not advise who had the burden of proof on this point, nor did it prescribe the character of the proof required by either party. If a country does persecute persons for their political beliefs, it probably also limits the freedom of foreign and native correspondents to report such facts, limits the accessibility of court records, tends to terrorize the residents so that they would be unwilling to make affidavits, and discourages their American relatives from making such affidavits. Already a number of cases have come before the courts, but no satisfactory solution of the evidentiary problem has been reached.²¹⁰

(*Saksagansky v. Weedin*, 53 F. 2d 13 (1931) and *Wolck v. Weedin*, 58 F. 2d 928 (1932).)

208. In *Berkman, Kjar* and *Ujich* cases bail was denied pending appeal. In the *Ujich* case the Supreme Court set bail at \$2,000 pending decision on petition for writ of certiorari, which was ultimately denied. (Citations in Appendix B.)

209. See similar section in 1952 Immigration Act, 243(h).

210. See notes 215 to 219, infra.

was given to the impounded deportees at Ellis Island that their voyage was about to begin. They had no opportunity to notify any one; and not until the 'Buford' was far out at sea were their relatives or friends or even lawyers of those who had lawyers aware of any intention to deport them at that or any other approximate time."¹⁹³ The same general procedures were repeated in more extensive raids on January 2, 1920, in which 2,500 to 5,000 persons were arrested in 33 cities.¹⁹⁴

The deportees from New England were chained and dragged through the streets of Boston on their way to Deer Island detention station, lined up for extensive photographing by newspaper reporters.¹⁹⁵ Throughout the country non-citizens were denied bail and held incommunicado,¹⁹⁶ they were beaten when they refused to make desired statements;¹⁹⁷ one learned that his signature had been forged to such a statement;¹⁹⁸ they were denied counsel until after the government had put in its case at their deportation hearings;¹⁹⁹ one was found dead after being held incommunicado by Justice Department agents for eight weeks in New York City and never turned over to the Labor Department;²⁰⁰ 800 were held in a section of a corridor in the Detroit Federal Building for 3 to 6 days and nights²⁰¹ and then subjected to brutality by guards at Fort Wayne.²⁰²

In 1936, Col. D. W. MacCormack, U. S. Commissioner of Immigration and Naturalization, speaking to a Congressional committee from the historical perspective of 16 years, summarized:

¹⁹³ Ibid., 5.

¹⁹⁴ For verbatim copies of instructions issued by Department of Justice officials in Washington to local agents, see *Colyer v. Skeffington*, 265 F. 17, 31-8 (1920). Post, op. cit. 91 and "Since the Buford Sailed", op. cit., 3.

¹⁹⁵ *Colyer v. Skeffington*, 265 F. 17, 44.

¹⁹⁶ Report on Illegal Practices 11, 31; Post, op. cit. 105.

¹⁹⁷ Report on Illegal Practices 31 (case of *Gaspare Cannone*).

¹⁹⁸ Ibid., 31-6, concerning the case of *Gaspare Cannone*, including photostatic copies of signature of non-citizen and signature on statement. Post cites many cases in which aliens made admissions of Communist Party membership while in custody of Justice Department which were patently false, such as admissions of membership prior to formation of the party. Post, op. cit., 216-17, 195-200.

¹⁹⁹ For discussion of change of rules re counsel at deportation hearings, see *Colyer v. Skeffington*, 265 F. 17, 46-7, and Post, op. cit. 85.

²⁰⁰ *Andrea Salsedo*. See accounts in Report on Illegal Practices 21-2; Post, op. cit. 279-82, and *Salsedo v. Palmer, et al.*, 278 F. 92 (2d Cir. 1921). For effect of this incident on other non-citizens, see testimony of Sacco and Vanzetti (arrested in Boston the day after Salsedo's death), II The Sacco-Vanzetti Case: Transcript of the Record of the Trial 1920-1927, 1849, 1808-9 (1928). The Justice Department maintained that Salsedo and Elia were held at their own request. (Post, op. cit. 280.)

²⁰¹ Report on Illegal Practices 22, quoting from The Nation, Jan. 31 and Apr. 10, 1920.

²⁰² Ibid., 24.

"* * * deportation law and the methods employed in its enforcement had earned the censure of the courts, the pulpit, the press and the public. A record number of deportations was the chief objective and the measure of efficiency. Arrests without warrant in violation of law were not the exception but the rule. Illegal raids on peaceful assemblages and forceful detention of those present, alien and citizen alike, were frequent occurrences. Third degree methods were employed."²⁰³

Attorney General Palmer explained the reason he adopted these methods: when you suppose you are "trying to protect the community against moral rats you sometimes get to thinking more of your trap's effectiveness than of its lawful construction."²⁰⁴

2. 1930-1937:

A study of the countries of origin of political deportees supports the thesis that the Immigration Service used political deportation cases to discourage social protest.

Countries of origin of political deportees:

Two preliminary points must be mentioned before presenting Table 12: 1) Many European boundaries changed between 1910 and 1937; so that 3 of the deportees were subject to deportation to nations other than those from which they had emigrated.²⁰⁵ 2) At this time the law provided no relief for non-citizens ordered deported to countries in which they feared they would be subjected to physical persecution. Several courts were deeply disturbed by this omission and attempted to ameliorate the situation by appealing to the discretionary powers of the Secretary of Labor.²⁰⁶

²⁰³ H. Res. 350, H. Doc. 392, 74th Cong., 2d sess. Judge Anderson wrote: "I refrain from any extended comment on the lawlessness of these proceedings by our supposedly law-enforcing officials. The documents and acts speak for themselves. It may, however, fitly be observed that a mob is a mob, whether made up of government officials acting under instructions from the Department of Justice, or of criminals, loafers, and the vicious classes!" (*Colyer v. Skeffington*, 265 F. 17, 43.)

²⁰⁴ Quoted in Post, op. cit. 93. Judge Bourquin commented on this point with vigor in *ex parte Jackson*, 263 F. 110 (1920).

²⁰⁵ See, e.g., *Berkman v. Tillinghast*, 58 F. 2d 621 (1st Cir. 1932) and comments in 1 I. J. A. Bull. 2, p. 4 (1932). This problem did not disturb Mr. Justice Brandeis in *Menservich v. Tod*, 264 U. S. 134 (1924). See also *Kessler v. Strecker*, 307 U. S. 22, note 1 on 25 re difficulty in getting consent of Polish government to accept Strecker, who was born in a part of Austria which became part of Poland after his emigration to the U. S.

²⁰⁶ Assistant Secretary of Labor Post faced this problem in several political deportation cases before him in 1919 (see note 53, supra). He ordered *Emma Goldman* and *Alexander Berkman* deported to "'Red Russia' * * * and not to 'White Russia,' where at that time they would probably have fared worse than a 'White' spy in a 'Red' camp." He sent them on the Buford because this would "secure their return to their home country, not as convicted criminals, which they were not,

This provision has not reassured deportees from Greece, Yugoslavia or Portugal, 5 of whom accepted voluntary departure to other countries after being ordered deported to their homelands. One Spanish national committed suicide pending final determination of his case.²¹¹

b) After recognition of the Soviet government by the United States in 1933, passports were made available by that government for a short time, and some deportations to Russia were effected. But by 1935, the Soviet government had adopted the policy of refusing to issue passports in any political deportation cases. This policy has been continued up to the present time and is now concurred in by the other Eastern European governments. This fact was, of course, known to the Immigration officials who issued the warrants in the deportation cases studied. Yet almost half of the persons arrested since 1944 were born in Russia or Eastern Europe and are therefore undeportable to their native lands. The 1950 Act²¹² for the first time permitted deportation of persons to countries other than their countries of origin, that is, a person born in Czarist Russia can now be deported to any country in the world which will accept him for permanent residence. However, since the enactment of this provision in 1950 no countries have exhibited a willingness to issue passports to political deportees from Eastern Europe or Russia.²¹³ The Immigration officials might have expected this result despite the change in our statutory approach.²¹⁴

The 1952 Act (sec. 242(e)) introduced criminal penalties (1) for willful failure to depart from the United States within six months of a final order of deportation, and (2) for willful failure to make timely application

for travel documents necessary for such departure. Three political deportees studied in the third period were arrested on one or both charges in 1953, and two have already been convicted and sentenced. Two of the three deportees were born in Eastern Europe or Russia and, in view of the uniform refusal of these countries to accept American deportees, it seems unlikely that their applications would have been accepted. The third deportee applied for travel documents to Finland after his arrest. Although these documents had arrived prior to the trial date, the Justice Department prohibited his immediate departure and went forward with the trial. After his conviction and sentence to two 5-year terms running consecutively, the Court provided that the second 5-year sentence could be suspended if the deportee left immediately after serving the first 5 years.^{214a} None of these prosecutions hastened the departure of the deportees, and one actually postponed it for five years. They did serve to punish the three deportees, and to "make examples" of them in the eyes of other non-citizens.

TABLE 13

COUNTRIES OF ORIGIN OF 219 POLITICAL DEPORTEES:
1944-1952

	No.	%
Countries in which deportees claim they would be subjected to physical persecution because of their political beliefs	26	13.
including		
Greece ²¹⁵	9	
Korea ²¹⁶	1	
Portugal ²¹⁷	1	

214a. *Martin Karasek*, 51, a native of Czechoslovakia, was ordered deported in 1935 but his departure was not effected. He has lived in the United States for 49 years. In 1953 he told Immigration officials that "it would have been a waste of time" to apply for travel papers from Czechoslovakia after passage of the 1952 Act. In May, 1954 he was convicted on the two counts, received a 20-year suspended sentence and was placed on probation for 20 years. The case is now on appeal. *Frank Spector* came to this country from Russia in 1913, and a 1930 order of deportation against him was never carried out. His attempt to have sec. 242(e) declared unconstitutional because of vague and indefinite language was unsuccessful (*United States v. Spector*, 343 U. S. 169 (1952)), and his trial was set for June, 1954. *Knut Heikkinen*, 64, editorial writer for a Finnish newspaper, has lived here 45 years. In April, 1954 he was convicted on two counts and sentenced to 10 years. His case is on appeal. (See citations in Appendix C; other information from counsel for deportees.)

215. This issue was not decided by any court in the *Hari-siades* case (342 U. S. 580 (1952)); the deportee finally accepted voluntary departure to Poland (1952) before the issue was tested further in the courts.

216. *San Ryup Park v. Barber*, 107 F. Supp. 603 and especially the second decision at 605 (Calif. 1952). Court granted writ after discussing the proof offered by the Service as to the type of treatment the deportee could expect to receive in South Korea.

217. In the *Figuerido* case, the Attorney General ruled that Portugal was not such a country. Mrs. Figuerido accepted voluntary departure to Poland (May 25, 1953) and did not test this ruling in the courts.

211. *Genaro Garcia*.

212. See similar section in 1952 Immigration Act, 243(a)(7).

213. Although *Shaughnessy v. U. S. ex rel. Mezei* (73 S. Ct. 625 (1953)) is an exclusion case, the facts are similar to some of the political deportation cases studied, since Mezei had lived in this country for 25 years prior to his two-year stay in Europe (1948-50), and he was excluded for membership in the International Workers Order. He applied to 25 countries for admission for permanent residence and to date has been rejected by 17. Two trips across the Atlantic were unavailing, since England and France refused to admit him. (He was detained at Ellis Island from shortly after the Supreme Court decision March 16, 1953 (N. Y. Times, April 23, 1953, p. 1), until July, 1954.) In *Kusman v. Shaughnessy* (Civ. No. 88-219, S. D. N. Y., Dec. 28, 1953), Judge Edward Weinfeld ordered deportee released by the Service because undeportable to Estonia.

214. See dissent of Justice Jackson in *U. S. v. Spector*, 343 U. S. 169 (1952): "A deportation policy can be successful only to the extent that some other state is willing to receive those we expel. But, except selected individuals who can do us more harm abroad than here, what Communist power will cooperate with our deportation policy by receiving our expelled Communist aliens? And what non-Communist power feels such confidence in its own domestic security that it can risk taking in persons this stable and powerful Republic finds dangerous to its security? World conditions seem to frustrate the policy of deportation of subversives. Once they gain admission here, they are our problem and one that cannot be shipped to some other part of the world." (179-80).

Spain ²¹⁸	1	
Yugoslavia ²¹⁹	14	
Countries which will refuse to accept these deportees for permanent residence and who therefore cannot be deported to their countries of origin	97	47.
including		
Russia, Estonia, Latvia, Lithuania, Ukraine (now U.S.S.R.)	123	60.
Albania, Bulgaria, Czechoslovakia, Hungary, Poland, Rumania	59	
Other countries of origin to which deportation could be completed	81	40.
including		
7 who were born in Philippine Islands as nationals of U. S. and who successfully sought to prevent their deportation to the now independent Philippine Islands ²²⁰		100.
Born in U. S., but alleged to have lost citizenship	1	
Countries of origin not known	14	
Total cases studied	219	

Since 60% of the persons arrested in the recent period probably cannot be deported, the reason for prosecution of their deportation cases must lie elsewhere.

Detention without bail and amount of bail required:

The attitude of the Immigration Service in denying bail and imposing parole conditions upon political deportees in the recent period is one of the clearest indications that the purpose of the deportation arrests is not solely the expulsion of undesirable aliens, but rather the "making an example" of "radical" non-citizens.

In February, 1948, five non-citizens were arrested for deportation in New York City, and denied release on bail by the Service. This was the first such denial

²¹⁸. Habeas corpus writ granted on this ground in *U. S. ex rel. Watts v. Shaughnessy*, 107 F. Supp. 613 (S. D. N. Y. 1952).

²¹⁹. Habeas corpus writs denied in *U. S. ex rel. Miletic v. Dist. Dir.*, 108 F. Supp. 719 (S. D. N. Y. 1952), and *U. S. ex rel. Dolenz v. Shaughnessy*, 107 F. Supp. 611 (S. D. N. Y. 1952).

²²⁰. June 17, 1953, the 9th Circuit Court of Appeals ruled, in *Mangaoang v. Boyd*, that Mangaoang was presently an alien but that, since he was a national of the U. S. at the time of his entry (before May 14, 1934, the effective date of the Philippine Islands Independence Act), he never "entered" within the meaning of the Internal Security Act of 1950 deportation provision, "aliens who are members of the Communist Party". The Supreme Court denied certiorari, 74 S. Ct. 129 (1953), and Mangaoang and two others similarly situated (*Absolar* and *Tancioco*) were subsequently released from deportation proceedings. On same point, see *Barber v. Gonzales*, 74 S. Ct. (1954), a non-political case.

of bail in deportation cases in many years.²²¹ Three of the five were national officers of trade unions,²²² one was a former leader of the German Communist Party who was trying to return to Germany,²²³ and one was a leader of the American Communist Party.²²⁴ The District Court dismissed their petitions for writs of habeas corpus when the Service contended that the Attorney General had not abused his discretion in denying bail, but released the deportees on \$3,500 court bail pending appeal from its decision.²²⁵ As a result of the decision of the Court of Appeals for the Second Circuit in August, 1948, administrative bail was granted during pendency of the deportation proceedings.²²⁶

From August 1948 until October 1950, the Immigration Service granted reasonable bail at the time of arresting political deportees, in most cases.²²⁷ The McCarran Act of 1950 changed the provisions concerning bail in deportation cases to permit the Attorney General, in his discretion, to continue the alien in custody pending final determination of deportability.²²⁸ There-

²²¹. See *Prentis v. Manooogian*, 16 F. 2d 422 (6th Cir. 1926); *Zapp v. Dist. Dir.*, 120 F. 2d 762 (2d Cir. 1941).

²²². *Ferdinand C. Smith*, National Secretary of National Maritime Union-CIO, executive board member CIO; *Charles A. Doyle*, International Vice-President of United Chemical Workers of America-CIO; *Irving Potash*, Vice-President of International Fur and Leather Workers Union-CIO (also member of Communist Party top leadership indicted under Smith Act in case of *Denis et al. v. U. S.*, 341 U. S. 494 (1951)).

²²³. *Gerhardt Eisler*.

²²⁴. *John Williamson*, National Trade Union Secretary of Communist Party.

²²⁵. See *U. S. ex rel. Eisler v. Dist. Dir.*, 76 F. Supp. 737, and *U. S. ex rel. Williamson v. Dist. Dir.*, 76 F. Supp. 739 (both S. D. N. Y., decided Feb. 17 and 18, respectively, 1948). Decision of Judge Bondy on March 6, 1948, granting bail pending appeal is not reported.

²²⁶. In *U. S. ex rel. Potash v. Dist. Dir.*, 169 F. 2d 747 and *U. S. ex rel. Doyle et al. v. Dist. Dir.*, 169 F. 2d 753 (both 2d Cir. 1948), the Court held that the Attorney General did not have unqualified discretion to fix bail in deportation cases and that the District Court should have held a hearing in order to determine whether or not there had been an abuse of discretion in refusing to fix bail. The hearing in the District Court was never held because in December 1948 the Service granted administrative bail of \$3,500 in place of the \$3,500 bail previously put up with Judge Bondy. For a short summary of the bail question in deportation cases, see VIII Law Guild Rev. 503-4 (1948).

²²⁷. Exceptions were the unreported cases of *Beatrice S. Johnson* and *Ferdinand C. Smith*, held in the summer of 1949 upon refusal to post \$25,000 bail; finally released on \$10,000 bail. (Information from the late C. King, Esq., New York.) See also *U. S. ex rel. Pirinsky v. Shaughnessy*, 188 F. 2d 708 (2d Cir. 1949).

²²⁸. Prior to the 1950 Act, the 1917 Immigration Act, as amended, had provided:

"Pending the final disposal of the case of any alien so taken into custody, he may be released upon a bond in the penalty of not less than five hundred dollars with security approved by the Attorney General, conditioned that such alien shall be produced when required for a hearing or hearings in regard to the charge upon which he has been taken into custody, and for deportation if he shall be

after, 13 of the 219 political deportees studied were denied bail at the time of their arrests.²²⁹

TABLE 14

BAIL AND DETENTION STATUS AT TIME OF ORIGINAL ARRESTS IN 219 POLITICAL DEPORTATION CASES: 1944-1952

Conditions of release	219 cases studied		% using figures compiled by Imm. Service, Dec. 1951 ²³⁰
	No.	%	
Recognizance, parole, conditional parole	20	12.	20.
\$ 500. bond	19	11.	10.
\$ 1,000.-1,500. bond	52	29.	28.
\$ 2,000.-3,500. bond	38	21.	24.
\$ 4,000.-5,000. bond	35	20.	12.
\$15,000. bond	0	0	.33
Detained, bail refused	13	7.	5.
Facts available	177	100.	100.
Facts not known	42		

Total cases studied 219

(Facts on bail and detention status were available in 177 of the 219 cases studied. The Immigration Service list contained 292 cases. Of this number, 144 appeared in the 177 cases studied by the writers.)

"The function of bail" in deportation cases "is to provide security for the appearance of the prisoner on the one hand and to protect his right to appeal, on the other."²³¹ In 12% of the cases the Service decided that the word of the deportees that they would appear for further proceedings was sufficient bond, without the necessity of putting up money bail. In 40% of the cases the bond was minimal.²³² In only 7% of the

found to be unlawfully within the United States." (8 U. S. C. 156, sec. 20.)

The 1950 Act (P. L. 831, Chap. 1024, 81st Cong., 2d Sess.) provided:

"Pending final determination of the deportability of any alien taken into custody under warrant of the Attorney General, such alien may, in the discretion of the Attorney General (1) be continued in custody; or (2) be released under bond in the amount of not less than \$500, with security approved by the Attorney General; or (3) be released on conditional parole."

Sec. 242(a) of the 1952 Act repeats the provisions in the 1950 Act, but adds a clause to (2): "be released under bond in the amount of not less than \$500 with security approved by the Attorney General, containing such conditions as the Attorney General may prescribe; * * *" (italics supplied).

229. Some of the 13 appealed to the courts for writs of habeas corpus but none of the cases reached the U. S. Supreme Court. See *U. S. ex rel. Belfrage v. Shaughnessy*, 113 F. Supp. 56, aff'd 211 F. 2d (2d Cir. 1954), for a recent political deportation case in which bail was denied by the Service at the time of arrest but granted by the court because the detention without bond was "without a reasonable foundation."

230. See Appendix C, note 1.

231. *Yanish v. Barber*, 73 S. Ct. 1105, 1108 (citing cases).

232. \$500 is the minimum bond provided for in the Act. Approximately \$302,500 was put up as bond in these civil deportation proceedings.

cases was bail denied. The Service was evidently correct in its estimate of the political deportees, since only one of the 219 deportees studied forfeited his bond by leaving the country illegally while proceedings were pending against him.²³³

However, in 1949 the Service required a number of deportees free on bail to report to the Service at regular intervals to answer questions as to changes of address, place of employment, etc. In court tests this requirement was upheld in some cases²³⁴ and rejected in others.²³⁵ It was carried into the McCarran Internal Security Act of 1950²³⁶ and the McCarran-Walter Act of 1952,²³⁷ together with other provisions for extensive control over deportees pending conclusion of their cases.²³⁸ Under these provisions, the Service in 1953 instituted the practice of calling in deportees to rewrite their bonds, adding conditions such as the following: deportees must agree to disassociate themselves from the Communist Party, other named organizations, and members of these groups; to discontinue any activity which might further the doctrines of these groups, and to give testimony under oath as to their activities and associations. (Failure to abide by such conditions to result in re-arrest and forfeiting the bail previously put up.) These requirements obviously raise serious constitutional questions as to vagueness of language in the conditions and as to violation of First Amendment guarantees to non-citizens. They also create difficult personal problems, particularly for deportees married to Communist Party officials or members, or to officials of other organizations on the Attorney General's list. These deportees apparently must choose between breaking up their homes by disassociating themselves from their spouses, or refusing to sign the agreement and subjecting themselves to re-arrest, indefinite detention and separation from both spouses and children.²³⁹ Justice Douglas recently granted bail

233. *Gerhardt Eisler*, see note 90.

234. E.g., *Lukas v. Ault et al.* (unrep.) (#27032, N. D. Ohio, E. Div., Feb. 7, 1950) (Freed, J.) But cf. *Petition of Brooks*, 5 F. 2d 238, 239 (D. C. Mass. 1925).

235. E.g., *Yanish v. Phelan*, 86 F. Supp. 461 (N. D. Cal., S. Div. 1949); *Hellman v. Zimmerman* (unrep.) (Civ. #9890, E. D. Pa., Aug. 3, 1949) (Bard, J.); *Saltzman v. Shaughnessy*, (unrep.) (Civ. #51-43, S. D. N. Y., Aug. 8, 1949) (Kaufman, J.).

236. Sec. 23.

237. Sec. 242(a).

238. Sec. 242(d).

239. Cases are pending in Federal District Court in Detroit involving close to 20 deportees who declined to sign new restrictive parole agreements and are seeking injunctive relief to prevent their incarceration. They are free pending decision in the cases. *In the Matter of Applications of Anna Kruchen et al.* (#12508), *Olimpiu Hanes* (#12507), *George Tacheff* (#12510) and *Arnold Schleich* (#12509) (all E. D. Mich., S. Div.) Several of the deportees involved are included in this study of 219 cases for 1944-1952, although their names do not appear in the titles of the cases. (Information from E. Goodman, Esq., Detroit.) In 6 similar cases in Los Angeles in which bail was cancelled May 18, 1953 and the deportees were

pending appeal in the first case to reach the courts on this issue.²⁴⁰ Yanish, a citizen of Russia, was admitted into this country in 1917. He was arrested under a deportation warrant in 1946, charged with membership in the Communist Party.

"Since his arrest and pending the determination of his deportability, he has been out on bond, first in the amount of \$1,000, then in the amount of \$500, and since 1949 in the amount of \$5,000. The Department of Justice makes no contention that the applicant is a person likely to flee or to go into hiding; nor that he has any criminal record or proclivity to conduct which would jeopardize the safety of the community, except his Communist Party membership which was the basis of the warrant of deportation. In fact during the seven years when applicant has been out on bond he apparently has been ready at all times to submit himself to the authority of the Immigration and Naturalization Service."²⁴¹

After the Board of Immigration Appeals confirmed the order of deportation, the Attorney General required Yanish to execute a new bond containing conditions similar to those described above.²⁴² Yanish refused to execute the bond and in due course was taken into custody.²⁴³ The District Court dismissed his petition for habeas corpus and his case is currently before the Court of Appeals. Both the District and Circuit Courts denied his application for bail pending appeal. Justice Douglas held that there is judicial review of the exer-

re-arrested, Federal Judge Harry C. Westover ordered 5 to be released on \$2,000 bail each, under the Justice Douglas opinion in the *Yanish* case (73 S. Ct. 1105). In the *Carlisle* case the Court held that the Service had presented sufficient evidence to warrant denial of bail. This case is on appeal to Justice Douglas. (Information from attorneys for deportees.)

240. *Yanish v. Barber*, 73 S. Ct. 1105 (May 16, 1953).

241. At 1106.

242. The condition included: a) alien to notify Immigration Service of any change in residence or employment within 48 hours after change is made; b) alien to apply for permission to change place of residence from one immigration district to another at least 48 hours prior to such change; c) alien shall report in person first Monday of each month to Immigration Service; d) "That said alien shall terminate and remain disassociated from, membership in, if any, support or other activity, if any, in or in furtherance of the doctrines and policies of, the Communist Party of the United States," * * * (or any subdivision thereof); e) "That such alien shall refrain from associating with any person, knowing or having reasonable ground to believe that such person is a member of or affiliated with or is engaged in any promotion of any of the activities mentioned in subparagraph (d) above;" f) "That said alien shall not violate section 2385 of the 'Smith Act' of June 25, 1948 (section 2385 of Title 18, U. S. Code * * * and section 4 of the Internal Security Act of September 23, 1950 (Section 783 of Title 50, U. S. Code) * * *". Quoted by Justice Douglas at 1107.

243. Yanish refused to execute the bond; filed a complaint in the District Court seeking an order restraining the Service from imprisoning him for failure to provide the new bond. The court held the conditions were within the power of the Attorney General to impose and denied relief.

cise of discretion by the Attorney General. As to the conditions imposed by the Immigration Service, he said:

"* * * The function of bail in situations such as the instant one is to provide security for the appearance of the prisoner on the one hand and to protect his right to appeal, on the other * * *. It is not apparent how at least some of the conditions attached to the bond serve those ends. Specifically, it is not obvious how the requirement that the alien give up his job with the Communist paper provides security for his appearance in case the Immigration and Naturalization Service can effect his deportation to Russia * * *. How that prohibition would do service in the tradition of Anglo-Saxon bail or how it would further the program of deportation which Congress has designed is not apparent * * *."²⁴⁴

Finding that Yanish's appeal presented substantial questions of law, Justice Douglas then admitted the applicant to \$5,000 bail "in the conventional meaning of the term" pending disposition of his appeal before the Court of Appeals.

As to deportees against whom an order of deportation has been outstanding for more than six months, the 1952 Act spells out the limits of the parole conditions which may be imposed, as follows:

"* * * (1) to appear from time to time before an immigration officer for identification; (2) to submit, if necessary, to medical and psychiatric examination at the expense of the United States; (3) to give information under oath as to his nationality, circumstances, habits, associations, and activities, and such other information, whether or not related to the foregoing, as the Attorney General may deem fit and proper; and (4) to conform to such reasonable writ-

244. At 1108. Justice Douglas said further: "Condition (e), which would prevent the applicant 'from associating with any person, knowing or having reasonable ground to believe' that such person is a Communist, would, taken literally, prevent him from living with his Communist wife or going to a movie with his Communist son or seeing his Communist legal adviser or being treated by his Communist doctor. * * * On oral argument the Department of Justice says that the language would not, as a matter of administrative practice, be construed that way. But there is a broad sweep to the language that would permit another ruling on a different day. Moreover, condition (d) would require applicant to give up his job with the *Peoples World*—a job which so far as the record shows is not itself an illegal undertaking either under state or under federal law. Whether, pending deportation, an alien can be forced under the present law to make that choice—to give up a lawful job with a Communist paper or go to jail—certainly is not a frivolous question."

Several deportees have lost one or more non-political jobs when arrested or re-arrested at their places of employment, e.g. *Joe Lukas* (Cleveland), *Leon Callove* (Niles, O.), father of 9 citizen-children, lost his job after being arrested at work. There were threats that his home would be burned down and thereafter the fire insurance company cancelled his insurance. (Information from J. Land, Esq., Cleveland.)

ten restrictions on his conduct or activities as are prescribed by the Attorney General in his case."²⁴⁵

For willful violation of such conditions the deportee can be tried, convicted of a felony, sentenced to one year and/or payment of \$1,000 fine.²⁴⁶

The Immigration Service has recently attempted to impose parole conditions on New York political deportees whose final orders of deportation were entered more than six months ago, as follows: a) that they report weekly in person to Ellis Island; b) that they do not travel outside a radius of 50 miles from Times Square; c) that they discontinue membership in the Communist Party; d) that they cease all association with persons whom they know to be members or affiliates of the Communist Party. Since at least three of the deportees are officers and employees of that party, as well as defendants in a Smith Act case now on appeal, these conditions (imposed under section 242(d) of the 1952 Act), would make it impossible for them to continue their employment, and also to collaborate in their Smith Act appeal with their co-defendants. Federal Judges of the Southern District of New York signed interim restraining orders in 3 cases brought in September, 1953 and 11 similar cases brought in June, 1954. A three-judge statutory court in that District heard argument June 30, 1954 on the government's motion to dismiss; decision is pending.^{246a}

In another challenge to section 242(d), the Court of Appeals for the Eighth Circuit just affirmed^{246b} the judgment of the Federal District Court in *Rowoldt v. Shrode* (Civ. #4612, Minn. 4th Div., Nov. 25, 1953 by Judge Matthew M. Joyce); which ordered the Immigration Service to release the bond posted by deportee-Rowoldt because more than six months had elapsed since the date of the final deportation order and there is no provision in the Act which authorizes the posting, or the continued posting, of bond after the six-month period expires.

In addition to its imposition of stringent conditions upon deportees freed on bond and those subject to

supervisory parole, the Service has evidently reconsidered its approach to the granting of bail since the passage of the 1950 and 1952 Acts. The prelude to this change occurred in the *Potash* case discussed above, in which the Service maintained that the five deportees should be detained throughout the deportation proceedings. The five were freed by court action and Chief Judge Clark of the Second Circuit, in his concurring opinion, raised this question:

"* * * Several of these relators now appear to be at large upon substantial, though not unusual, bail upon criminal charges.²⁴⁷ If such bail is adequate there, it does seem an anomaly to require absolute imprisonment upon non-criminal charges. Moreover, if the charges involve substantially the same issues as here, the result of an open and adversary trial before judge and jury would seem a better ground upon which to base eventual deportation than that of an administrative hearing. If so, long-continued confinement administratively would seem yet more of an anomaly."²⁴⁸

But when the new act went into effect on October 22nd, 1950, the Service promptly rearrested 48 political deportees who had previously been arrested for deportation and freed on bail. All 48 brought actions for writs of habeas corpus.²⁴⁹ In none of the cases did the Service introduce evidence indicating the reason for the rearrest of the specific deportees.²⁵⁰ Rather it maintained that the Attorney General had absolute discretion to decide whether or not bail should be granted, and that the exercise of this discretion was not reviewable by the courts. In none of the cases did the Service charge that the deportee had violated the conditions of his bond or failed to appear when requested to do so.

246a. Judge Edward J. Dimock signed the interim restraining order in the *Bittleman* and *Gannett* cases, and Judge Edward W. Weinfeld signed an identical order in the *Jones* case, in Sept., 1953. The 11 cases brought in June, 1954, involve *Borich*, *Geiser*, *Gottesman*, *Kusman*, *Nelson*, *Nukk*, *Saltzman*, *Siminoff*, *Sklar*, *Taffler* and *Young*. (Citations in Appendix C for italicized cases; information from counsel, B. Freedman and G. Agrin, Esqs., New York.)

A similar restraining order was issued Dec. 17, 1953 in St. Louis in *Sentner v. Colarelli*, (Civ. #9440(1), E. D. Mo., E. Div.) by Federal Judge George H. Moore.

246b. *Shrode v. Rowoldt*, (not yet rep.), No. 15,027 (8th Cir.), decided June 17, 1954.

247. *Williamson* and *Potash* had been indicted under the Smith Act and *Eisler* had been indicted for making false statements on application for departure, and in an enemy alien case.

248. *U. S. ex rel. Potash v. Dist. Dir.*, 169 F. 2d 747 at 753 (1948).

249. For complete list of citations for the 48 cases, see King and Ginger, op. cit., XI Law. Guild Rev. 128, 129, notes 7, 8 and 10.

250. *Ibid.*, 130-1 for verbatim copy of telegraphic instructions ordering the arrests.

245. Sec. 242(d), Immigration Act of 1952; formerly Sec. 23(b), Internal Security Act of 1950. The origin of this provision may be found in HR 4768, 76th Cong. (introduced by Rep. Hobbs, 1939) which provided that certain classes of deportees, including political cases, whose deportations could not be effected because of failure or refusal of their native lands to issue passports, should be "confined, though not at hard labor, until such time as deportation shall have become feasible." Congress took no action on the measure. In May 1939 an amended bill providing only for detention (provision for labor on farmlands having been omitted) passed the House 288-61 but was defeated in the Senate. In 1941 Hobbs reintroduced the bill. The then Attorney General (now Justice) Jackson made proposals which were incorporated in HR 3, 77th Cong., 1st Sess. These proposals by Jackson included exactly the same provisions now found in Sec. 242(d) of the 1952 Act. For a discussion of the constitutionality of the provisions, see IX I. J. A. Bull. 124 (1941).

246. Sec. 242(d), Immigration Act of 1952.

by the Service.²⁵¹ All 48 were eventually enlarged on bail, put up either with the courts or the Service.²⁵²

August 2, 1951, 39 deportees were re-arrested, including several of those detained in October, 1950. These re-arrests were based on a decision by the Service that bail put up by the Civil Rights Congress Bail Fund was no longer acceptable, and new bail would have to be furnished by these persons.²⁵³ (This decision followed the non-appearance of several Communist Party leaders whose bail had been furnished by this Bail Fund when they were indicted for violating the Smith Act.) All 39 were released on bail after relatively short periods of detention. In several cases they were released by District Courts on Bail Fund Bail.²⁵⁴

In addition to these re-arrests in 1950 and 1951, a few of the 219 non-citizens were re-arrested in 1952 and 1953. Altogether there have been 90 re-arrests involving 71 aliens.²⁵⁵ The following table indicates the outcome of such re-arrests.

TABLE 15

NUMBER OF RE-ARRESTS AND LENGTH OF DETENTION OF RE-ARRESTS: 1944-1952

	No.	Immigration Service figures, Dec. 1951 ²⁵⁶
Re-arrested once	71 deportees	51 deportees (inc.
Re-arrested twice	15 deportees	all re-arrests)
Re-arrested three times	4 deportees	
Total days detained	3,885 days *	1,859 days **
Average days detained	55 days *	36 days **
No. held over 2 months	14 deportees *	8 deportees **

* Figures do not include those detained when first arrested and never released.

** Figures do not include 11 detentions whose duration is not known to the writers.

251. Ibid., 131, note 32, 132, note 35.

252. After the adverse decision in *Carlson et al. v. Landon*, 342 U. S. 524 (1952), the Service, in the fall of 1952, accepted administrative bail for the four non-citizens involved in that case. In May, 1953 *Carlisle* was re-arrested and in July *Hyun* was ordered to surrender for deportation to South Korea (where he claims he will face physical persecution); *Mrs. Stevenson* was also ordered to surrender, and after some detention, was deported. (Information from deportees' attorneys). Despite the adverse decision in *Zydok v. Butterfield*, 342 U. S. 524 (1952), the Service did not re-arrest *Zydok*.

253. See discussion in King and Ginger, op. cit., 133 and cases cited there in notes 44 and 45.

254. Ibid., 133 re six cases in Detroit which came before District Judges Lederle and Levin. The Service refused to accept bail put up by bondsmen acceptable to the District Court (S. D. N. Y.) in another (criminal) case, in *U. S. ex rel. Bittelman v. Dist. Dir.*, (unrep.) (Civ. #68-382, Aug. 20, 1951) (Weinfeld, J.).

255. As of April, 1953.

256. For explanation of the discrepancy between the writers' figure and the figure given by the Service, see note 1 to Appendix C.

Since deportation is not punishment for a crime, but a proceeding for the expulsion of undesirable aliens, it is unusual that one-third of the persons arrested for deportation and freed on bail were later subjected to incarceration, one for 18 months and several over four months. When their cases finally reached the courts, all but 7 were released (out of 90 re-arrests). Over one-third were released on the same amount of bail which they had put up when originally arrested, and two were actually released on lower bail.

In searching for the reasons for such incarceration, these facts appear: of the 26 deportees in this period who accepted voluntary departure, 13 had been re-arrested once, 4 had been re-arrested twice and one three times. Since 11 of the 26 were born in Russia or Eastern Europe and were therefore undeportable, it may be inferred that they departed in order to avoid further re-arrests.

TABLE 16

DETENTION AND RELEASE OF DEPORTEES AT TIME OF ORIGINAL ARRESTS AND RE-ARRESTS

	No.	Immigration Service figures, Dec. 1951 ²⁵⁷
No. of detentions of deportees, including at time of arrest and re-arrests (more than one re-arrest in some cases)	90	63
No. released by court setting bond at time of original arrest	5	3
No. released by court after re-arrest:		
on same bond originally accepted by Service	35	31
on higher bond than that originally accepted by Service	20	16
on lower bond than that originally accepted by Service	2	1
No. who departed at time of re-arrest	2	not shown
No. not released	7	12
Facts concerning release not known	19	0
Totals	90	63

The issue of detention and parole conditions obviously becomes critical when the proceedings are protracted.

257. Ibid.

Length of Proceedings:

TABLE 17

LENGTH OF TIME BETWEEN ARREST AND JAN. 1953 OR
DATE OF CONCLUSION OF CASE: 1944-1952

No. of years pending	Cumulative	
	No. of cases	%
21 to 33 years.....	8	4.
Over 16 years.....	15	8.
Over 11 years.....	24	13.
Over 6 years.....	44	23.
Over 4 years.....	127	66.
Over 2 years.....	193	100.
Total known	193	
Total not known.....	26	
Total cases studied.....	219	

Of the 26 cases ending in voluntary departure, one had been pending 22 years, 1 for 16 years, and two for 6 to 8 years.

Persons outside the Immigration Service cannot be sure of the reasons for the length of the administrative proceedings. In many cases, a delay of two years was caused by the failure of the Service to comply with the provisions of the Administrative Procedures Act, effective in 1947. All hearings held between 1947 and February, 1950 (when the *Sung*²⁵⁸ decision was handed down by the Supreme Court) were void and new hearings were necessary, even though the Service was later exempted from the provisions of the Act.²⁵⁹ Since outright victory is seldom achieved in these cases, counsel for the deportees have not customarily pressed for immediately administrative action when the Service moved slowly.²⁶⁰

No comparison between length of deportation proceedings and other types of actions is possible, since no comparable statistics are available. Criminal law cases are similar to deportation proceedings in terms of bail, detention status, and penalties. It seems doubtful, how-

ever, that many criminal cases continue as long as these deportation proceedings, even where there are repeated appeals to the courts following conviction.²⁶¹ The long administrative proceedings concerning increases in railroad fares or other public utilities problems are not comparable, since the outcome does not affect the lives of individual defendants. Most civil cases come to trial within two years of their inception, and, even with appeals, do not customarily last over four years.

Conclusions

I. On the basis of the material presented above concerning the three periods studied, it is possible to arrive at two conclusions concerning the "alienage" of the political deportees arrested:

A. Since the mass arrests of citizens and aliens without warrants in 1919-1920, there has been a change of policy in the Immigration Service. Arrests now take place by means of warrants, and the persons arrested are, by legal definition, aliens.

B. While a constructive change in policy was being made in this regard, an opposite trend was developing. The political deportees of the first period were still largely "aliens" in the sociological sense at the time of their arrests. While many of them had lived in this country for a decade or more, and some had families and organizational ties here, it is probably true that, as a group, they still spoke their native languages and spent most of their time with members of their national groups. The political deportees of the second period were younger, had lived in this country no longer than the first group. But they seem to have become a part of American life of the period to some extent by participating in trade unions, etc. It is more difficult to peg them accurately than it is the third group. The majority of the deportees of the 1940's and '50's are not "aliens" in any sense except a strictly legal one. Through long residence here, and the resultant family and work ties, they have become Americans and the responsibility of the American government. They have not engaged in activities limited to their nationality groupings, nor have they retained close ties with the countries of their

258. *Sung v. McGrath*, 339 U. S. 33. (1950).

259. See note 20, *supra*.

260. Perhaps the classic instance of administrative delay occurred in the *Harisiades* case. Harisiades was arrested by local police in New England in 1930 in connection with picketing during a strike. At that time he was interrogated by Immigration agents, the interview transcribed and signed by Harisiades. He was then released. In 1938 he moved to New York; the newspapers published notice of his marriage and of the subsequent births of his two children. In 1940 he registered under the Alien Registration Act, giving his address. Later he applied for citizenship. His name was listed in the telephone book in New York for a number of years, and it also appeared in the masthead of the language newspaper which he edited. In 1946 he was arrested for deportation (during interrogation on his citizenship application) on a warrant dated 1930. The Immigration agents stated to his counsel that they had not been able to locate him in the intervening years.

261. See, e.g., two exceptional criminal cases: the Sacco-Vanzetti case began in the spring, 1920, and the two were executed in August, 1927. (*Commonwealth v. Sacco and Vanzetti*, 255 Mass. 369, 151 NE 839; 259 Mass. 128, 156 NE 57; 261 Mass. 12, 158 NE 167; cert. den. 275 U. S. 574 (1927).) The Scottsboro cases went up to the Supreme Court three times, legal proceedings lasting from 1931 to 1938. (Names of defendants not given each time, but including *Patterson*, *Powell*, *Weems*, *Norris*, *Wright v. Alabama*, 224 Ala. 524 and 531 and 540, 141 S. 195 and 201 and 215 (1932); 287 U. S. 45 (1932). 229 Ala. 226 and 270, 156 S. 556 and 567 (1934); 294 U. S. 587 and 600 (1935). 234 Ala. 342, 175 S. 371 (1937); cert. denied 302 U. S. 733 (1937). 236 Ala. 261 and 263 and 281, 182 S. 3 and 5 and 69 (1938).)

birth. The current trend is to arrest for deportation people who have failed to achieve American citizenship, (although many applied for naturalization), but who have become Americans in the sociological sense.

II. Despite the gaps in the available information and the difficulties of generalizations in the area of political beliefs and activities, certain conclusions seem to flow from the material presented above concerning the proscribed actions, beliefs and affiliations of the political deportees studied:

A. The government did not present evidence of illegal actions of political deportees in the great majority of the cases studied in the three periods; that is, there was no evidence of actual attempts to use force or violence to overthrow the government of the United States. Only a few of the deportees were convicted under state or federal sedition statutes for acts relating to the advocacy of the use of force and violence, and none for the use thereof. Therefore the brutal methods of arrest or confinement in the first period and the restrictions on bail in the third period seem unwarranted.

B. In the first period the government presented proof in about 100 cases indicating that the individual deportees personally believed in or advocated the abolition of all government (anarchy) or believed that the government might/would be overthrown by force (as expressed in Marxist theory). In the second period, while the government relied primarily upon membership in proscribed organizations as the basis for deportation, it made some efforts to prove the proscribed character of the beliefs of the deportees, either through their own statements or through proof of their participation in strikes, demonstrations, or other mass activities. In the third period the government tried in only one case to establish personal belief in the violent overthrow of the government, and in that case it failed to prove this to the satisfaction of the Board of Immigration Appeals. In all of the other cases the government made no effort to prove that the individual deportee had illegal thoughts or plans or purposes.

C. The question, then, is the propriety of deporting people from the United States solely on the basis of membership in proscribed organizations. The problem is complicated by the fact that there is no statute of limitations in the 1918 Act, so that people can be deported for Communist Party membership which ended years before their arrests for deportation. It is further complicated by the fact that the non-citizens may have had no reason to believe that membership in the Communist Party was grounds for deportation at the time they joined that party, since it was not named in the deportation statutes until 1950. (It does

not seem likely that the majority of the non-citizens studied had an intent to act so as to make themselves deportable under the 1918 Act.²⁶² If guilt by association and bills of attainder violate due process in criminal cases, it is not easy to see why they should be permitted to be the basis for the majority of political deportations.²⁶³

III. Less than 10% of the non-citizens arrested for deportation in the three periods actually were expelled or accepted voluntary departure from this country. (An additional 16% may have been expelled.) Since this result could have been foretold in advance in the first and third periods, it is not difficult to believe that the motivating force behind the arrests was not deportation but the desire to discourage other Americans from acting as the political deportees had done. The Immigration Service has consistently favored statutory changes and has tried to achieve court victories which would make the Attorney General's decisions on the granting or denial of bail absolute and not subject to judicial review. The number of deportees held without bail (at the time of arrest or at some time during pendency of the proceedings) and the degree of control over the deportees enlarged on bail have increased markedly in the third period. It does not seem unlikely that the Service, as part of the Justice Department, is considering the use of deportation proceedings as a means of punishing "conspiracy to advocate" proscribed ideas, even though it realizes in advance that deportation will be impossible. Such a short-cut to punishment without judicial trial does not seem consonant with traditional principles of due process.

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262. See discussion by Justice Black in his dissent in *Galvan v. Press*, 74 S. Ct. 737, 744 (1954), quoted in part in note 147.

263. The importance of the omission of these traditional safeguards in deportation cases can be observed quickly in connection with the 1944-1952 period: 70% of the deportees (for whom facts were available) were charged with past, concluded membership in the Communist Parties of the United States or the countries of their birth. Under the 1939 decision in the *Strecker* case, none of these would be deportable. In 1940 Congress amended the Act to make past membership grounds for deportation. (1) If the prohibition against ex post facto legislation applied in deportation proceedings, 82% would not be deportable because their membership ceased prior to the passage of this Act. (2) If the recommendation of the President's Commission were accepted, 69% would not be deportable because the proposed ten-year statute of limitations on deportations had run at the time of their arrests. (3) If the prohibition against findings of guilt by association applied in deportation proceedings and the membership and affiliation sections of the 1918 Act were repealed, none of the 219 non-citizens could be deported for personal belief in proscribed doctrine on the facts elicited in their deportation hearings. It is not a little doubtful that facts could be elicited to prove personal belief in proscribed doctrines or personal activities of a proscribed character, in view of the decision of the Board

APPENDIX A

Sources of Material on Political Deportation
Cases: 1919-1920

Cases: *Colyer v. Skeffington*, 265 F. 17 (D. C. Mass. 1920), rev'd on limited grounds in *Skeffington v. Katzeff*, 277 F. 129 (1st Cir. 1922). Re final outcome of one of the cases, see *Petition of Brooks, Bonder v. Johnson, Commr.*, 5 F. 2d 238 (D. C. Mass. 1925). *U. S. ex rel. Diamond v. Uhl*, 266 F. 34 (2d Cir. 1920); *ex parte Jackson*, 263 F. 110 (D. C. Mont. 1920); *U. S. ex rel. Rakics v. Uhl*, 266 F. 646 (2d Cir. 1920); *U. S. ex rel. Weinstein et al. v. Uhl*, 266 F. 929 (S. D. N. Y. 1920); *Salsedo v. Palmer, et al.*, 278 F. 92 (2d Cir. 1921); *Petition for Naturalization of John Waskowski*, #306755, certificate #6309250 (unrep.), (N. D. Ill. Mar. 18, 1946) (Barnes, J.). *Gaspare Cannone*, Labor Dept. Ellis Island file #54861/382.

Congressional Investigations: (1) Administration of Immigration Laws. Hearings before the Committee on Immigration and Naturalization, House of Representatives, 66th Cong., 2nd Sess., March 20, 31, April 6, 9, 10, May 25, 1920. (2) Communist and Anarchist Deportation Cases, and I.W.W. Deportation Cases. Hearings before a Subcommittee of the Committee on Immigration and Naturalization, House of Representatives, 66th Cong., 2nd Sess., April 21-24, 27-30, 1920. (3) Investigation of Administration of Louis F. Post, Assistant Secretary of Labor, in the Matter of Deportation of Aliens, and Attorney General A. Mitchell Palmer on Charges Made against Department of Justice by Louis F. Post and Others. Hearings before the Committee on Rules, House of Representatives, 66th Cong., 2nd Sess., on H. Res. 522, 1920.

Unofficial Investigations: (4) deSilver, "Since the Buford Sailed: a summary of developments in the deportation situation" (American Civil Liberties Union 1920); (5) Post, "The Deportations Delirium of Nineteen-twenty—A personal narrative of an historic official experience" (Kerr & Co. 1923); (6) "Report upon the Illegal Practices of the United States Department of Justice" (National Popular Government League, Washington, D. C., May 1920) (prepared by 12 lawyers and law professors, including R. G. Brown, Zechariah Chafee, Jr., Felix

Frankfurter, Ernst Freund, Swinburne Hale, Francis Fisher Kane, Alfred S. Niles, Roscoe Pound, Jackson H. Ralston, David Wallerstein, Frank P. Walsh and Tyrrell Williams.)

APPENDIX B

Sources of Material on 53 Political Deportation
Cases: 1930-1937

The Monthly Bulletin of the International Juridical Association, from its inception in 1932, regularly discussed unreported political deportation cases. The information on the cases was obtained from counsel for the deportees and from copies of pleadings prepared in the cases. The cases below are listed alphabetically by surname of the deportee.

Andanoff v. Zurbrick (unrep.) (#6387, 6th Cir., June 6, 1933) (per curiam); *Anderson v. U. S.*, 44 F. 2 953 (9th Cir. 1930); *Baer v. Norene*, 79 F. 2d 340 (9th Cir. 1935); *Alex Bail*, II I. J. A. Bull. 11, p. 4 (1934); *Erich Becker*, IV I. J. A. Bull. 4, p. 7 (1935); *Berkman v. Tillinghast*, 58 F. 2d 621 (1st Cir. 1932) and A 5-721-844;¹ *U. S. ex rel. Boric v. Marshall*, 4 F. Supp. 965 (W. D. Pa.); *aff'd* 67 F. 2d 1020 (3d Cir.), *cert. granted* 290 U. S. 623, *petition withdrawn* at 709 (1935); *Branch v. Cahill*, 88 F. 2d 545 (9th Cir. 1937); *Ray Carlson*, III I. J. A. Bull. 8, p. 6 (1935); *Villi Eccor*, I I. J. A. Bull. 6, p. 1 (1932); *Evanoff et al. v. Bonham*, 50 F. 2d 756 (9th Cir. 1931); *U. S. ex rel. Fernandes v. Commr.*, 65 F. 2d 593 (2d Cir. 1933); *U. S. ex rel. Ferrero v. Commissioner*, 86 F. 2d 1021 (2d Cir. 1936), *cert. den.* 300 U. S. 653 (1937); *Ex parte Fierstein*,² 41 F. 2d 53 (9th Cir. 1930) and A 4-663-283; *U. S. ex rel. Fortmueller v. Commr.*, 14 F. Supp. 484 (S. D. N. Y. 1936); *Emil Gardos*, IV I. J. A. Bull. 5, p. 2 (1935) and 11, p. 2 (1936); *Sol Goldband*, IV I. J. A. Bull. 4, pp. 1, 6-8 (1933); *Greco v. Haff*, 63 F. 2d 863 (9th Cir. 1933); *Arthur Hertz*, V I. J. A. Bull. 4, p. 37 (1936); *Kenmotsu v. Nagle*, 44 F. 2d 953 (9th Cir. 1931), *cert. den.* 283 U. S. 832; *U. S. ex rel. Kettunen v. Reimer*, 79 F. 2d 315 (2d Cir. 1935); *Kjar v. Doak*, 61 F. 2d 566 (7th Cir. 1933); *LaGrassa*, IV I. J. A. Bull. 4, pp. 1, 6; *U. S. ex rel. Mannisto v. Reimer*, 77 F. 2d 1021 (2d Cir. 1935), *cert. den.* 296 U. S. 600; *Alfred Miller*, IV I. J. A. Bull. 11, p. 2 (1936); *Alexander Mills*, I I. J.

¹ A-numbers are Immigration and Naturalization Service Central Office file numbers.

² The five deportees thus noted were not deported in this period, but were re-arrested for deportation in the third period studied, 1944-1952, and are included in the 219 cases discussed there, except for Mrs. Petroskey, who was re-arrested in 1953.

of Immigration Appeals in the *Harisiades* case where it was attempted, (and also in the B.I.A. decision in the second *Bridges* case). (4) If the prohibition against bills of attainder applied to deportation proceedings, all of the cases would have to be re-heard and facts presented to prove the proscribed character of the Communist Party at the time of the individual deportees' membership, and it might not be possible to prove this as to membership in the 1930's within the *DeJonge* and *Herndon* decisions of the Supreme Court.

A. Bull. 3, p. 1 (1932); *Murdoch v. Clark*, 53 F. 2d 155 (1st Cir. 1931); *Nathan Newman*, II I. J. A. Bull. 10, p. 4; *Nishimura*, I I. J. A. Bull. 3, p. 1; *U. S. ex rel. Ohm v. Perkins*, 79 F. 2d 533 (2d Cir. 1935); *Ex parte Panagopolous*, 3 F. Supp. 222 (Cal. 1933), and I I. J. A. Bull. 8, p. 1 (1932) and II I. J. A. Bull. 1, p. 2 (1933); *Perlich*, I I. J. A. Bull. 2, p. 1 (1932); *Stella Petroskey*,² IV I. J. A. Bull. 4, p. 7 and IV I. J. A. Bull. 5, pp. 2-3 (1935); *U. S. ex rel. Popoff v. Reimer*, 79 F. 2d 513 (2d Cir. 1935); *Lorenzo Puentes and Wilfredo Puentes*, V I. J. A. Bull. 7, p. 73 (1937); *Otto Richter*, IV I. J. A. Bull. 4, p. 8 (1935) and V I. J. A. Bull. 5, p. 53 (1936); *In re Saderquist*, 11 F. Supp. 525 (D. Me. S. D. 1935), *aff'd sub nom. Sorquist v. Ward*, 83 F. 2d 890; *Otto Sahkanen*, IV I. J. A. Bull. 4, p. 6 (1935); *Saksagan-sky v. Weedon*, 53 F. 2d 13 (9th Cir. 1931); *U. S. ex rel. Sallitto v. Commr.* 85 F. 2d 1021 (2d Cir. 1936) and VI I. J. A. Bull. 101 (1938); *Jack Schneider*,² II I. J. A. Bull. 10, p. 4 (1934), IV I. J. A. Bull. 4, pp. 7-8 (1935); *Joseph Scovio*, I I. J. A. Bull. 6, p. 1 (1932); *Sormunen v. Nagle*, 59 F. 2d 398 (9th Cir. 1932); *Kessler v. Strecker*,² 95 F. 2d 976 (5th Cir. 1938), 307 U. S. 22 (1939); *Joseph Szak and Norman Tallentire*, II I. J. A. Bull. 11, p. 4 (1934); *Ujich v. Commr.*, 75 F. 2d 1022 (2d Cir. 1935), *cert. den.* 295 U. S. 746 (1935); *ex parte Vilarino*, 50 F. 2d 582 (9th Cir. 1931); *Jack Warnick*, IV I. J. A. Bull. 11a, p. 3 (1936); *Werrmann v. Perkins*, 79 F. 2d 467 (6th Cir. 1935); *Wolck v. Weedon*, 58 F. 2d 928 (9th Cir. 1932); *U. S. ex rel. Yokinen v. Commr.*, 57 F. 2d 707 (2d Cir. 1932).

APPENDIX C

Sources of Material on 219 Political Deportation Cases: 1944-1952

The citation is given without the name of the case when the non-citizen was involved in the case but his name does not appear in the title.

A—numbers are Immigration and Naturalization Service Central Office file numbers.

*—indicates information concerning name of non-citizen, bail or detention status, from Immigration Service list prepared for the U. S. Supreme Court, Dec., 1951¹

1. After hearing argument on the question of denial of bail in the *Carlson and Zydok* cases (*Carlson et al. v. Landon* and *Butterfield v. Zydok*, 342 U. S. 524 (1952)), Mr. Justice Frankfurter requested the Immigration and Naturalization Service to prepare a list of pending cases involving subversive charges, showing the bail or detention status of the deportees prior to the passage of the Internal Security Act of 1950, and thereafter. These lists are contained in Supplemental Memorandum for the Respondent in #35 and for the Petitioner in #136, October Term, 1951, pp. 6-17, dated Decem-

Information received directly from attorneys for deportees is listed by name of attorney and city.

°—indicates information from attorneys for deportees contained in the files of *The Lamp*.²

The list is given in alphabetical order by surname of the deportee. Only one spelling is given for each name, except where an alias was used which was totally dissimilar. Only those cases are cited in which the facts about the non-citizen were stated in the pleadings or opinions, and no attempt was made to cite every deportation case in which the 219 non-citizens appeared. An effort has been made to include all pertinent information as of June, 1954.

Isaac Abraham;° *Casimiro Absolar**°; *Andrulis** v. *Jordan*, (unrep.) (Civ. #1509, N. D. Ill. E. Div., Oct. 30, 1950) (Campbell, J.); *Toma Babin*;° *Alex Ealint*, S. Handelman, Esq., Cleveland; *David Balint*, A 4-563-545; *Bertha Barker*,* A 2-845-312; *James Barker*,* A 2-845-311; *Luisa Moreno Bemis*, King & Ginger, *The McCarran Act and the Immigration Laws*, XI Law. Guild Rev. 128, 129 note 8 (1951); *Norman Bernick*;° *Harry Bersin*, the late C. King, Esq., New York City; *Charles Bidien*;° *William Bigelow*;° *U. S. ex rel. Bittelman** v. *District Director*, 99 F. Supp. 306 (1951), and 94 F. Supp. 157 (1950),³ (both S. D.

ber, 1951 (and see note 31, p. 55 in the majority opinion of Mr. Justice Reed.) They contain somewhat more than 292 cases. (For the purposes of this article, cases were omitted in which the Service had not apprehended the individual or in which the deportee was serving time on a criminal charge throughout the period studied.)

Of the 292 cases there reported, 144 are contained in the 219 cases studied for the third period discussed in this article. The difference in number of cases is due to several factors: 1) the writers included cases which had started after 1944 and had been concluded before 1951; 2) the writers included material on the cases studied up to April, 1953 as to detention or bail status; 3) the Service included a number of cases which arose late in 1951 on which the writers did not have enough information to warrant their inclusion; 4) the Service obviously omitted several cases then pending, including the cases of *Peter Harisiades* and *Refugio Martinez*, which were heard by the Supreme Court in the 1951 and 1952 terms, respectively; 5) the Service obviously omitted a number of re-arrests which took place in August, 1951 when the Service required new bail from those deportees who had originally posted bail put up by the Civil Rights Congress Bail Fund. That the 219 cases are not atypical as to bail or detention status can be seen by comparing the figures on these points in Tables 14, 15 and 16. The writers have no reason to believe that the 219 cases are atypical in other respects.

2. *The Lamp* is the publication of the American Committee for Protection of the Foreign Born, which has appeared monthly or semi-monthly since 1944. It contains information on various types of immigration cases, including political deportation cases. The information is obtained from attorneys for the deportees. The material was found to be accurate when checked against other sources, such as pleadings and judicial opinions and the list as to bail and detention status described in note 1.

3. For a complete list of the non-citizens re-arrested in October, 1950 (including those whose names were not listed in the titles of cases), see King and Ginger, *The McCarran Act and the Immigration Laws*, XI Law. Guild Rev. 128, 129, notes 7, 8 and 10.

N. Y.); *Julius Blichfeldt*; *° *Francesco G. Bonetti*,* A 1-273-106; *U. S. ex rel. Boric* * v. *Marshall*, 4 F. Supp. 965 (D. Pa.); (67 F. 2d 1020, 290 U. S. 623 and 709) (1935); *Joseph Boross*,* A 4-496-104; *Alec C. Burleigh*; *° *Willy Busch*,* 94 F. Supp. 157 (S. D. N. Y. 1950); *Triphon Buzeff*; ° *Pedro Cabornay*; *° *Leon Callow* (Nicoloff),* J. Land, Esq., Cleveland; *Constancio Cargado*; *° *Harry Carlisle*,* 187 F. 2d 991 (9th Cir.), 342 U. S. (1952); *Carlson* * et al. v. *Landon*, 187 F. 2d 991 (9th Cir.), 342 U. S. 524 (1952), (a/k/a Solomon Skolnick); *U. S. ex rel. Cattonar v. District Director* (unrep.) (Civ. #69-129, S. D. N. Y., Aug. 31, 1951) (Sugarman, J.), and 94 F. Supp. 157 (S. D. N. Y. 1950); *Krishna Chandra*,* I. Englander, Esq., New York City; *U. S. ex rel. Charasch v. Dist. Dir.* (unrep.) (Civ. #24-275, S. D. N. Y., 1944) and Central Office #56150/550; *Paul Cinat*,* A 4-368-234, N. Y. Times Aug. 4, 1951; ⁴ *Paul Cline*, A 5-828-446; *Coleman* * v. *McGrath*, 342 U. S. 580 (1952); *Francisco E. Corona*,* A 5-487-776; *Ada V. Crewe*,* the late C. King, Esq., New York City; *John B. Crewe*,* the late C. King, Esq., New York City; *James Cryan*,* ° *Justo Cruz-Solorio*,* A 3-577-045; *Armando L. Davila*; ° *Anna Deikus*; ° *John Descovich*; ° *Albert J. Des Rosiers*; *° *Juan Diaz*, A 5-034-841; *Robert E. Dickhoff*,* A 5-156-681, B. I. A. opinion Nov. 17, 1949; *U. S. ex rel. Di Dente v. Ault*, 101 F. Supp. 496 (N. D. Ohio, E. Div. 1952); *Kondo Dimitroff*; ° *Sarah Disend*; *° *Jaroslav Dmytryk*,* A 5-042-291; *Andrzej Dmytryshyn*,* A 5-390-614, and 94 F. Supp. 157 (S. D. N. Y. 1950); *U. S. ex rel. Doyle* * v. *Dist. Dir.*, 169 F. 2d 753 (2d Cir. 1948) and 112 F. Supp. 143 (S. D. N. Y. 1953); *Dumas* * v. *Hanscom* (unrep.) (#334 h/c, S. D. W. Va., Oct. 31, 1952) (Moore, J.); *Socrates Economides*; ° *U. S. ex rel. Gerhardt Eisler v. Dist. Dir.*, 76 F. Supp. 737 (S. D. N. Y. 1948), and *Eisler v. Clark*, 77 F. Supp. 610 (D. C. D. C. 1948) (see *Potash et al. v. Clark*, cert. den. 338 U. S. 879 and 199 F. 2d 166 (D. C. Cir. 1952)); *Hans Eisler*, A 7-501-031, N. Y. Times Feb. 22, 1948, p. X-7; *Hilde Eisler*, the late C. King, Esq., New York City; *Rushdi Emin*,* A 3-865-062, N. Y. Times Aug. 4, 1951; *Per Eriksson*; ° *Agustin Esparza*,* A 3-577-048; *Elias v. Espinoza*,* A 5-489-955; *In re Estrada* * (unrep.) (Civ. #4125, N. D. Tex., Dallas Div., Oct. 28, 1950) (Atwell, J.); *Ruth Fabian*; ° *Ex parte Fierstein*,* 41 F. 2d 53 (9th Cir. 1930), and A 4-663-283; *U. S. ex rel. Eulalia Figuerido* * v. *Dist. Dir.*, 202 F. 2d 958 (2d Cir. 1953) and A 4-072-502; *Jean J. Fougereuses*; *° *In re Fox* * (unrep.) (#30115, N. D. Cal., S. Div., Oct. 26, 1950) (Roche, J.); *Blanche Fradkin*; *° *Julius Fritz*, A 3-430-058; *Anna Ganley*,* A 5-038-040,

N. Y. Times Aug. 4, 1951; *Betty Gannett*,* 94 F. Supp. 157 (S. D. N. Y. 1950); *Genaro Garcia*; ° *Mike B. Garph*; ° *William Gava*,* A 4-157-721; *Bessie Geiser*,* A 5-581-560 (HF); *Harry Goldstin*; *° *Ida Gottesman*,* N. Y. 2270-449825; *Charles G. Grant*; ° *John Greenberg*; *° *Aaron Grosberg*,* 29270/867 (1930's #) and B. Freedman, Esq., New York City; *Gzslaw Grzelak*; ° *Carolina Halverson*; *° *Harisiades v. Shaughnessy*, 90 F. Supp. 431, 187 F. 2d 137, 342 U. S. 580 (1952), A 5-300-756; *Heikkila* * v. *Barber*, F. Supp. _____, 73 S. Ct. 603 (1953); *U. S. ex rel. Heikkinen v. Gordon*, 190 F. 2d 16 (8th Cir. 1951); *Frank Hellman*; *° *Sol Hertz*,* N. Y. Times Aug. 4, 1951; *Matter of Hilty* * (unrep.) (#5153, E. D. Wis., Nov. 17, 1950) (Tehan, J.); *Teresa Horvath*; *° *Katherine M. Hyndman*; *° *David Hyun*,* 187 F. 2d 991 (9th Cir.), 342 U. S. 524 (1952); *Monica Itryna*, A 4-858-017; *Cecil Jay*; *° *Beatrice S. Johnson*, A 4-691-768, N. Y. Times Sep. 9, 1948 (14:5); *Gustav Johnson*, A 4-740-059; *Claudia Jones* * *Scholnick v. Clark*, 81 F. Supp. 298 (D. C. 1949), and 94 F. Supp. 157 (S. D. N. Y. 1950); *U. S. v. Karasek* (no decision to date) (Crim. #1-161, S. D. Ia., Cent. Div.); *Wasyk Kardasz*; *° *Keller v. Jordan* (unrep.) (Civ. #1509, N. D. Ill., E. Div., Oct. 30, 1950) (Campbell J.); *In re Kemenovich* * (unrep.) (#9179, W. D. Pa., Nov. 1, 1950) (Burns, J.); *Diamond Kim*; ° *Klig* * v. *Watkins*, 84 F. Supp. 486 (S. D. N. Y. 1949); and *Klig et al. v. Shaughnessy*, 94 F. Supp. 157 (S. D. N. Y. 1950); *Alex Knaisky*; ° *Joseph Knerly*,* A 4-090-098; *Charles Kohler*; *° *Richard Kohler*; ° *Marko Kosta*,* A 5-394-076 and N. Y. Times Aug. 4, 1951; *Julian Krasowski*,* N. Y. Times Aug. 3, 1951; *Charles Kratochvil*,* A 4-582-117; *Marie Kratochvil*; ° *Maria Kristalsky*,* A 5-376-672; *William Kruchay*,* A 5-227-469; *Kushnir v. Jordan* (unrep.) (#50 C 1528, N. D. Ill., E. Div., Nov. 10, 1950) (La Buy J.); *Herman Lansburg*, A 5-009-851; *Latra* * v. *Nicolls*, 106 F. Supp. 658 (Mass. 1952); *Petros Lezos*, LA 1600-00926; *Lichota* * v. *Jordan* (unrep.) (#50 C 1528, N. D. Ill., E. Div., Nov. 10, 1950) (La Buy, J.), A 5-439-032; *Dora Lipshitz*; ° *Josef Lubej*,* A 4-095-766; *Lukas* * v. *Ault* (unrep.) (#27806, N. D. Ohio, E. Div., Nov. 20, 1950) (Freed, J.), A 3-382-868; *Jurij Lukman*; *° *Hamish Mackay*; *° *Mackay* * v. *Butterfield* (unrep.) (Civ. #1220, N. D. Ind., Nov. 17, 1950) (Swygert, J.); *Mangaoang* * v. *Boyd*, 186 F. 2d 191 (9th Cir., 1950) and *Mangaoang v. Boyd* (not yet rep.) (9th Cir., June 17, 1953); *Martinez v. Neelly*, 197 F. 2d 462 (7th Cir., 1952), 73 S. Ct. 39 (Memo. 1953), A 3-407-165; *Mascitti* * v. *McGrath*, 342 U. S. 580 (1952); *John Mastrondea*,* N. Y. Times Aug. 4, 1951; *In re Mensalvas*,* (unrep.) (no number, N. D. Cal., S. Div., Oct. 26, 1950)

4. For a discussion of the re-arrests of non-citizens in August, 1951, see *ibid.*, 133, notes 42 to 45a.

(Roche, J.); *Samsen Milgrom*,* A 5-738-734; *Ida Miller*,* A 5-321-836; *Jacob Miller*,* SF:1300-114146; *U. S. v. Minasian*,* (not yet tried) (indictments #22088 and 22026 C. D., S. D. Cal.); *Martin Misir*,° *Joseph Modotti*, LA:16541-2136; *Ed Murk*, B. Freedman, Esq., New York City; *Ivan Nabeshka*,* A 1-405-091; *Peter Nelson*,° *Rose Nelson* (Lightcap),* A 4-942-707, 94 F. Supp. 157 (S. D. N. Y. 1950); *Carl R. Newstrom*,*° *U. S. ex rel. Nukk v. Esperdy*, 108 F. Supp. 640 (S. D. N. Y. 1952); *Michael Obermeier*,* A 4-690-122; *Andrew Overgaard*,° *Angelo Pagotto*,*° *Carl Paivio*,* 94 F. Supp. 157 (S. D. N. Y. 1950); *Peter Paliaga*,° *Antonio Papadimitrou*,*° *Papandreau** v. *Butterfield* (unrep.) (#9908, E. D. Mich., S. Div., Nov. 6, 1950) (Lederle, J.) and *In the Matter of Papandreau* (unrep.) (#10798, E. D. Mich., S. Div., Aug. 7, 1951) (Levin, J.); *Stefano Petrola*,*° *U. S. ex rel. Pirinsky v. Shaughnessy*, 177 F. 2d 708 (2d Cir. 1949) (70 S. Ct. 232); *Podolski v. Baird*, 94 F. Supp. 294 (E. D. Mich. 1950); *Nick Poleschuk*,* A 3-282-099; *Michael Popescu*, A 4-822-072; *Blaga Poprovska*,* A 3-482-220; *U. S. ex rel. Potash** v. *Dist. Dir.*, 169 F. 2d 747 (2d Cir. 1948), and *Potash et al. v. Clark*, 77 F. Supp. 610 (D. C. 1948) (cert. denied 338 U. S. 879, and 199 F. 2d 166 (D. C. Cir. 1952)); *Annie Powers*,* A 3-284-774; *In the Matter of Price* (unrep.) (#10795, E. D. Mich., S. Div., Aug. 7, 1951) (Lederle, J.), A 8-139-905; *Jose Prudencio*,*° *Sergius Prus*,*° *Leon Prusekas*,° *Mike Puchacz*,*° *Quattrone** v. *Nicolls* (not yet rep.) (#53-4 SMC, D. C. Mass.) (cert. denied 74 S. Ct. (1954)); *George Raddtorich*,*° *Jose Raymundo*,° *Resnikoff** v. *Jordan* (unrep.) (Civ. #1509, N. D. Ill., E. Div., Oct. 30, 1950) (Campbell, J.); *Abraham Roast*,*° *Victor Romond*,* D. Twitchell, Esq., Cleveland; *Ida Rothstein*, A 4-564-948; *Charles Rowaldt*,*° *Morris Rubin*,*° *Rachel Rubin*,* A 7-210-178; *Fritz Rust*,* A 4-855-375; *Michael Salerno*, A 5-651-001; *Matter of Benny Saltzman** (unrep.) (Cit. Pet. #2270-387387, S. D. N. Y., May 22, 1944) (Bright, J.), and the late C. King, Esq., New York City; *John Santo*, C. O. #56090/143; *Sassieff** v. *Boyd*, 186 F. 2d 191 (9th Cir. 1950); *Esther Sazer*,* A 5-958-673; *Schlossberg** v. *Ault* (unrep.) (#27805, N. D. Ohio, E. Div., Nov. 20, 1950) (Freed, J.); *U. S. ex rel. Schneider v. Esperdy*, 108 F. Supp. 640 (S. D. N. Y. 1952); *ex parte Sentner*,* 94 F. Supp. 77 (S. D. Mo. 1950); *Peter Shikas*,° *Humberto Silex*,° *Joseph Siminoff*,° *George Siskind*, 94 F. Supp. 157 (S. D. N. Y. 1950); *Otto Skog*,* A 4-519-994, and opinion of Board of Immigration Appeals, Jan. 5, 1952; *Ferdinand C. Smith*, 77 F. Supp. 610 (D. C. 1948) (cert. denied 338 U. S. 879, and 199 F. 2d 166 (D. C. Cir. 1952)); *U. S. v. Spector*, 99 F. Supp. 778, 343 U. S.

169 (1952) and CO #55648/805; *Andrew Spehar*,*° *Jacob Stachel*,* N. Y. Times Sep. 9, 1948 (14:5); *John L. Stenson*,*° *Matter of Stess*,* (unrep.) (#5154, E. D. Wis., Nov. 17, 1950) (Tehan, J.); *Alexander Stevens*, A3-404-243 and N. Y. Times Sep. 1, 2, 3, 1948; *Miriam Stevenson*,* 187 F. 2d 991 (9th Cir.), 342 U. S. 524 (1952); *Kessler v. Strecker*,* 95 F. 2d 976, 307 U. S. 22 (1939); *Ardullio Susi*,° *Theresa Szerdi*,* A 2-825-198; *Anna Taffler*,* A 5-655-384; *Morris Taft*,* A 4-474-547; *Ramon Tancio*,*° *Steve Tandaric*,° *U. S. ex rel. Tarazona v. Dist. Dir.* (unrep.) (Civ. #6919, S. D. N. Y. Aug. 16, 1951) (Weinfeld, J.), and 94 F. Supp. 157 (S. D. N. Y. 1950); *Demetry Timoshuk*,*° *Peter Tkachuk*, A4-325-513; *Ponce Torres*,*° *John Tuhy*,° *Paul Val-lon*,° *George Vasiloff*,* S. Handelman, Esq., Cleveland; *Giovanne Vidolin*,* A 4-905-546; *John Voich*,° *Warhol** v. *Shrode*, 94 F. Supp. 229 (D. Minn. 1950); *Joe Weber*,*° *Application of William Weber*,* 94 F. Supp. 376 (S. D. N. Y. 1950) and N. Y. Times Sep. 9, 1948 (14:5); *William Weiner*, N. Y. Times Sep. 9, 1948 (14:5); *U. S. ex rel. Williamson v. Dist. Dir.*, 76 F. Supp. 739 (S. D. N. Y. 1948); *Hazel Wolfe*,*° *In re Yanish** (unrep.) (#30114, N. D. Cal., S. Div., Oct. 26, 1950) (Roche, J.), and *Yanish v. Phelan*, 86 F. Supp. 461 (N. D. Cal., S. Div. 1949), and *Yanish v. Barber*, 73 S. Ct. 1105 (1953); *U. S. ex rel. Yaris v. Esperdy*, 108 F. Supp. 735 (S. D. N. Y. 1952), and *U. S. ex rel. Yaris v. Dist. Dir.*, 112 F. Supp. 143 (S. D. N. Y. 1953), and *U. S. ex rel. Yaris v. Esperdy*, 202 F. 2d 109 (2d Cir. 1953); *Arsin Yergonian*,* A 2-797-594-BP-C; *U. S. ex rel. Young v. Shaughnessy*, 194 F. 2d 474 (2d Cir. 1952); *U. S. ex rel. Yuditz v. Esperdy*, 108 F. Supp. 640 (S. D. N. Y. 1952); *George Zallas*,° *William Zazuliak*, A 4-087-800; *Zydok** v. *Butterfield*, 187 F. 2d 802 (6th Cir. 1951), 342 U. S. 524 (1952), and A 5-096-547.

APPENDIX D

**Aliens Deported from the United States, by Cause,
Fiscal Years 1908 to 1951 ***

1948.....	3
1949.....	4
1950.....	6
1951.....	18

Period	Cause: "anarchists and kindred classes" **
1908 to 1951.....	1,283
1908 to 1910.....	0
1911 to 1920.....	353
1911 to 1917.....	0
1918.....	2
1919.....	37
1920.....	314
1921 to 1930.....	642
1921.....	446
1922.....	64
1923.....	13
1924.....	81
1925.....	22
1926.....	4
1927.....	9
1928.....	1
1929.....	1
1930.....	1
1931 to 1940.....	253
1931.....	18
1932.....	51
1933.....	74
1934.....	20
1935.....	17
1936.....	47
1937.....	17
1938.....	8
1939.....	1
1940.....	0
1941 to 1950.....	17
1941.....	0
1942.....	1
1943.....	0
1944.....	0
1945.....	0
1946.....	0
1947.....	3

* The figures for 1908 through 1948 were abstracted from Table 5 (pp. 873-4) and Table 7 (pp. 877-9), Senate Report 1515, 81st Cong., 2d Session, The Immigration and Naturalization Systems of the United States; Report of the Committee on the Judiciary pursuant to S. Res. 137 (80th Cong., 1st Sess., as amended). A resolution to make an investigation of the Immigration System. April 20, 1950, G.P.O. Washington, D. C.

The figures for 1949, 1950 and 1951 were taken from the Immigration and Naturalization Service, Annual Report for 1951, p. 61.

The Senate Report indicated that no deportation statistics by cause are available prior to the fiscal year 1908.

** Abbreviation for political deportation cases within Act of October 16, 1918, as amended.